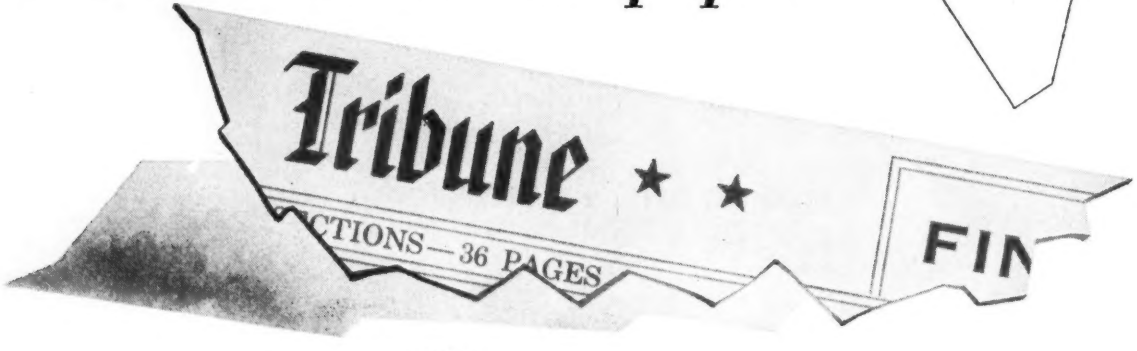
Journal

January 1954

tribune
is a magistrate

but
Tribune *is a newspaper*



The dictionary gives you a choice. Spelled with a small initial "t," tribune can mean an official, a defender of the people, a dais, a rostrum, a magistrate.

With a capital "T," however, Tribune is the name of a newspaper. And a magistrate, being up on his law, would caution you to respect and honor the right of the Tribune to capital treatment. Tribune is a trade-mark, and the owners of the mark have the right—and the duty—to guard it diligently.

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Contents

JANUARY, 1954

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
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The President's Page

William J. Jameson

■ I have found widespread interest in the action of the House of Delegates at the 1953 Annual Meeting with respect to the study of procedures in congressional investigations. There has also been some misunderstanding and some misrepresentation. A factual statement of the action taken by the Association on this important subject may result in a clearer understanding among our members.

The Special Committee on Individual Rights as Affected by National Security reported to the House of Delegates that the Fund for the Republic had made a grant of $50,000 to the American Bar Association to provide research for this Committee. With reference to the study of congressional investigations, the report said:

"We also reported last year that one of the areas which we had selected for study was that of Congressional investigations. The problem of harmonizing the broad powers of investigation with the protection of individual rights was recognized to be an important and delicate one requiring careful study. Documentation of past and present practices, including improvements made by particular committees, is necessary. The committee has made some preliminary analysis of the problem and has outlined the general areas for its proposed investigation. It expects to embark upon such a full-scale study as soon as qualified objective research personnel can be obtained. The committee has made leaders of both parties in both Houses of Congress aware of its proposed study. It has given assurance that the study will be conducted in an objective and cooperative spirit and that proposed recommendations will be explored with interested members of both Houses. We are hopeful that by proceeding in this way the Association may make a genuine contribution to a most important subject."

In oral comments on this report, the Chairman of the Committee, Whitney North Seymour, said in part:

"We have advised the leaders of both Houses that we propose to make this study and they have said that they would welcome such a study. They thought a study by the organized Bar would be extremely helpful, because members of Congress, both Houses and both parties, recognize that there is a problem which needs attention, and the bar associations over the country have recognized it. So we propose to make that study. We have told the leaders of Congress that before we formulate any final recommendations, we propose to discuss the outcome of our study with them, and we hope that the cooperative nature of the study will be recognized generally and will be extremely useful."

Resolutions were introduced in both the Assembly and the House of Delegates. The resolution adopted by the House of Delegates reads as follows:

> WHEREAS, the procedures for the conduct of Congressional investigations are receiving extensive consideration by the Congress, and
>
> WHEREAS, the views and assistance of lawyers are especially important to this Congressional consideration because one of the chief subjects under consideration is the protection of individual rights by more extensive participation by lawyers for witnesses in said investigations without impairing the essential investigatory power of the Congress;
>
> NOW, THEREFORE, BE IT RESOLVED, That the Special Committee on Individual Rights as Affected by National Security is hereby authorized to make a study of procedures for the conduct of Congressional investigations and report thereon with its recommendations to the midwinter meeting of the House of Delegates in Atlanta in March, 1954.

In commenting on this resolution, Charles S. Rhyne, Chairman of the Committee on Draft, reported that it had been called to the Committee's attention "that the House had adopted a resolution praising the House Un-American Activities Committee and the Senate Committee on Internal Security for their fair treatment of witnesses who appeared before them, and that the resolution should be redrafted to avoid all possible construction that this House is in any way criticizing the present procedures of any Congressional committee". The sponsor of the resolution, Charles H. Woods, of Arizona, concurred in the committee amendments and stated that "in the original draft I tried very hard to make it plain that I myself was not criticizing Congress or its legislative work, but on the other hand, was trying to protect that essential activity".

The prior resolution to which Mr. Rhyne referred was adopted by the

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American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Who Speaks for the American Lawyer?

■ This is written as an effort to make clear the simplicity and the complexity of the American Bar Association organization. Elected by the members of the Association in each state are the state delegates. Elected by state and local bar associations (which include lawyers not members of the American Bar Association) are the Association delegates. Elected by affiliated organizations are other delegates. These delegates constitute the House of Delegates, which is designed to act as the legislative body for the lawyers of America. The Board of Governors ranks as a committee of the House of Delegates and exercises administrative and executive authority when the House of Delegates is not in session—as directed by the House.

Sections and standing and special committees make studies of legal questions in various fields of the law and report to the House. Outside of the Headquarters staff, no salaries are paid, except that the Secretary and Treasurer receive modest compensation. Few persons realize the amount of uncompensated time given to the Association by the President, the Board of Governors, chairmen of Sections, members of Committees, delegates and others active in the work of the Association. For example only, the President gives practically all his time for a year, the members of the Board of Governors probably a minimum of six weeks, and members of the House perhaps two weeks; other workers more or less.

The writer has attended annual meetings for some thirty years; has been a state delegate since 1936, when the present organization became effective, and served on the Board of Governors and the Budget Committee for three years, 1936-1939.

All reports of Sections and Committees come first to the Board, are reviewed in advance of the annual and midwinter meetings, and the opinion of the Board thereon is submitted to the House at those meetings. The Board and the delegates take their work seriously. It is no idle task for the Board to read and argue out the points involved in the reports, and later in the House to listen to the development of the same and perhaps additional arguments. It is a considerable chore for the members of the House to read the reports and to study the background of important issues preparatory to meetings and to voting. The final vote is equivalent to a legislative decision on behalf of the lawyers of America. As to most questions a referendum would be impracticable. States or associations not satisfied with the action of their representatives may elect others, but an intelligent referendum would require all lawyers who vote to give the subjects the same study as do the delegates—a practical impossibility. The majority of American lawyers are interested primarily in local matters and probably would not even read the necessary literature if it were sent to them. Sadly enough the majority of American lawyers are not members of our Association.

At the Boston meeting a proposal was made for a referendum on the Bricker-Knowland amendment to the Constitution of the United States. It seems to me that those who father this proposal should pause—to consider the legislative aspects of our Association and, as well, the problems incident to the amendment itself.

There are those who oppose any amendment. There are the American Bar Association draft, the Bricker draft as reported by the Senate Judiciary Committee, and the last-minute Knowland suggestion. From the days of Dumbarton Oaks through the adoption of the U. N. Charter, UNESCO, the Declaration of Human Rights, the Covenant of Human Rights, the Genocide Pact, the treaty for press coverage (for Freedom of Information), the Convention of the political rights of women—over these years, many able men have been thoughtful of the possible loss of our constitutionally guaranteed individual rights within the domestic field. Speeches, pamphlets and articles in legal and other periodicals have flooded the country for those who would listen and read. Without going into detail as to the merits of the controversy, it is sufficient now to say that an enlightened opinion can only be reached through long and careful study—such as has been given by the American Bar Association Committee on Peace and Law and by the delegates acting for the Association in the House of Delegates. The last recorded vote of those delegates in August, 1953, overwhelmingly adhered to the previous action of the House favoring amendment. The Bricker Resolution, Senate 1, favors amendment. The Knowland suggestion, said to meet with the approval of the present Administration, favors amendment. What may be the final language draft after the House of Representatives has acted and there has been a confer-

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ence of House and Senate cannot now be predicted. To phrase accurately now a provision that one might assert was beyond the possibility of change is beyond the capacity of most lawyers, perhaps of anyone.

It is not derogatory of any person now in office to insist that the people of this country are entitled to an amendment of the Constitution that will be another link in the chain that binds men in action. What has happened may happen again. The Court-packing plan was endorsed by the Lawyer's Guild, which was organized practically coincident with the offering of that plan and has only now been designated by the Attorney General as Communist dominated. The facts and treaties previously referred to herein were supported by men of good intentions as well as others in the last Administration—the State Department and even Mr. Dulles then approved. In view of the storm of protest which has followed, that approval is now withdrawn; yet no man can say when the winds may again shift to the danger of passengers in our Ship of State.

So I conclude that the subject is not one for referendum: the great majority of busy lawyers cannot and would not give the time necessary to a sound judgment on this great issue. The Bar of this country will do better to leave it to the legislative action of its House of Delegates.

LOUIS E. WYMAN
Manchester, New Hampshire

The Pardon of St. Ives

■ In the October, 1953, issue of the AMERICAN BAR ASSOCIATION JOURNAL you published a brief article over the name of Mr. Pendleton Beckley entitled: "The Pardon of St. Ives". I was happy to see this brief description given in the JOURNAL of the celebration of the seventh centenary of the birth of the patron saint of lawyers.

However, in the third paragraph of the article Mr. Beckley writes: "He [St. Ives] gave up his office as a priest in the church to become a lawyer to represent the poor." To the best of my knowledge this statement is historically inaccurate. In fact just the opposite is the truth. For in 1298 he found it necessary to resign his legal work in order to devote his full time to the care of his newly assigned parish of Louannec. In 1303, because of rapidly failing health, Ives retired to Kermartin where he died on May 13 of that year.

I think this position is of some importance to understand the life of St. Ives. For as a priest-advocate he could only handle the cases of those who were too poor to engage a lay lawyer.

FRANCIS J. CALLAHAN, S. J.
School of Law
University of San Francisco

Mr. Nichols and the Mississippi Bar

■ On page 930 of the JOURNAL for October appears a letter from Robert G. Nichols, Jr., of the Jackson Bar, regarding the activities of the Junior Bar Section of the Mississippi State Bar. This letter is all right so far as it goes, but it is far too modest. As a matter of fact the Junior Bar Section is the very salt of the Mississippi State Bar and accomplishes about four-fifths of the work that is done by the whole bar association. Incidentally, Mr. Nichols made one of the best Presidents our Junior Bar Section ever had and he is now Second Vice President of the Mississippi State Bar. . . .

PHIL STONE
Oxford, Mississippi

HAVE YOU CONSIDERED

What Membership in the AMERICAN BAR ASSOCIATION *Means to You?*

- **The prestige of affiliation with the oldest and largest national organization of the legal profession**
- **Pleasant and rewarding professional contacts and associations**
- **Tangible benefits in your daily practice from the specialized work and reports of the Sections and Committees**
- **The satisfaction of furthering the worthy objectives of the organized Bar in service to the profession and the public**
- **Access to the various publications of the Association as well as to the American Bar Center library**
- **Strengthening the voice of the legal profession on the national scene**
- **Protection of the integrity and independence of the Bench and Bar**

Membership in the three components of the organized Bar—national, state and local—is in no sense duplicative. Each has its distinct sphere and serves specific needs. Only in proportion to the strength of each, and in proportion to their combined strength, can the organized Bar discharge its responsibilities to the public and serve your professional needs.

Undoubtedly, you have friends and associates in the practice who are not members of the Association. If you will drop a line to the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, giving their names and addresses, an attractive brochure describing the achievements, present activities in the public interest, services to members and all lawyers and the objectives of the Association, will be mailed to them. By interesting such prospective members in the Association, you will be serving them, yourself, the profession and the public.

ANNOUNCEMENT

of

1954 Essay Contest

Conducted by

AMERICAN BAR ASSOCIATION

Pursuant to terms of bequest of Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted: On or before April 1, 1954.

Amount of Prize: Twenty-five Hundred Dollars.

Subject To Be Discussed:

"The Investigating Power of Congress, Its Scope and Limitations."

Eligibility:

The Contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1954 (except previous winners, members of the Board of Governors, officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this Contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the American Bar Association.

AMERICAN BAR ASSOCIATION
1140 North Dearborn Street
Chicago 10, Illinois

The Impeachment of Andrew Johnson:

A Political Tragedy

by **H. H. Walker Lewis** of the District of Columbia Bar

■ The assassination of President Lincoln, at the very beginning of the Reconstruction Era, struck the keynote of tragedy and bitterness that reached their climax on the third anniversary of the famous Second Inaugural Address with its pledge of malice toward none and charity for all. On March 4, 1868, the House of Representatives presented articles of impeachment to the Senate, accusing President Johnson of high crimes and misdemeanors. The impeachment was the result of a long and acrimonious struggle between Johnson, who was determined to carry out Lincoln's policy of reconciliation with the defeated South, and the Radical Republicans in Congress, who were determined to punish the rebel states. Mr. Lewis' article captures the drama and the tragedy of the impeachment trial. This article was originally prepared for presentation to the Rule Day Club, of Baltimore, which he describes as a group of lawyers "who take turns subjecting each other to this sort of thing".

■ The impeachment of President Johnson was not so much the trial of an individual as the culmination of a clash between legislative and executive power. The outcome of the proceedings has had a more profound effect upon our form of government than it had upon President Johnson himself.

Even while the Civil War was raging, a deep cleavage over reconstruction policies had developed between President Lincoln and the extremists of his Party, known as Radical Republicans. Lincoln wished to restore the South, the Radicals wished to remake it. They had carried the torch for the abolition of slavery and they retained all the righteous intolerance that the abolition movement had generated. High among their objectives were the enfranchisement of the former slaves and the disfranchisement of their rebellious masters.

It was Lincoln's view that the Southern states were still members of the Union and retained their constitutional rights as such. The basic issue settled by the war was that states could not secede. Accordingly, they must still be states and the problem was to get them back into their proper practical relation with the Union. To do this was largely a matter of developing, through appropriate terms of amnesty, a sufficient body of loyal citizens to elect and administer their governments. Their former leaders had disqualified themselves by rebellion, but once loyal governments could be restored, their citizens would have the same right to govern themselves as those of any other state.

The Radical Republicans, on the other hand, took the position that the seceding states, by their rebellion, had forfeited their rights under the Constitution and were to be administered as conquered territory until such time as Congress saw fit to readmit them to the Union. Meanwhile they would have the same general status as other territories and would be subject to the full legislative power of Congress.

The Republican leader of the Senate, Charles Sumner, of Massachusetts, added an individual variation to the Radical theory. Article IV, Section 4 of the Constitution guarantees that each state shall have a republican form of government, and it was Sumner's view that the seceded states could not meet this qualification until they had enfranchised the Negroes and admitted them to full participation in their governments. A flaw in this theory was that several of the Northern states also denied Negroes the right to vote and stubbornly continued to reject state constitutional amendments enfranchising them.

To the Radical Republicans, as to Lincoln, the theories were less significant than their practical consequences. These were of the utmost importance. Under Lincoln's view, the restoration of the seceded states to the Union was primarily the responsibility of the executive. The Constitution vested the right of

pardon or amnesty in the President and he could accordingly determine the conditions upon which individuals who had participated in the rebellion could be restored to the rights which they had forfeited. Once granted amnesty, they could elect their own governments and make their own laws, including laws as to suffrage. The Army would be merely an aid to civil power, and military government would dissolve as soon as civil authority could be restored. Acting on this theory during the war, President Lincoln had by executive action brought about the creation of provisional governments for Arkansas, Louisiana, Tennessee and Virginia. At considerable personal hazard, Andrew Johnson had accepted appointment by Lincoln as Military Governor of Tennessee and had remained in that post until elected Vice President in 1864 on the Union ticket.

The Radical Republicans maintained that reconstruction was a legislative function and that it was the prerogative of Congress to prescribe the forms of government and conditions of suffrage for the South. This theory was vital to continued Party power. If the Southern states were merely restored, their leaders would be Democrats. Furthermore, the Thirteenth Amendment abolishing slavery had effected an ironic anomaly in that it entitled the Southern states to increased representation in the House of Representatives. Under the original Constitution, slaves were counted at only three-fifths, but under the Thirteenth Amendment, they must be counted in full.

During the hostilities, Lincoln's views had prevailed, but his renomination as President in 1864 had been bitterly opposed by the same congressional leaders that later pilloried Johnson. At his last Cabinet meeting, held after the surrender of Lee and the day before his own assassination, Lincoln had said:

> I think it providential that this great rebellion is crushed out just as Congress has adjourned, and there are none of the disturbing elements of that body to embarrass us.

Johnson Becomes President After Lincoln's Assassination

On April 9, 1865, General Robert E. Lee surrendered his army at Appomattox Courthouse and for practical purposes the Civil War was at an end. Six days later, on April 15, President Lincoln died and Andrew Johnson became President of the United States.

Andrew Johnson was born on December 29, 1808, in Raleigh, North Carolina, of parents in humble circumstances. His father died when he was 4 and at the age of 14 he was apprenticed to a tailor. In 1826 he migrated to Greeneville, Tennessee, and in the following year married Eliza McCardle, a girl of refinement and education. Johnson had no formal education, but in the tailor shops of those times it was customary for someone to read aloud to the workmen and he himself learned to read. His wife taught him to write and encouraged his self-education.

His business prospered, and in 1829, at the age of 21, he embarked on a career of public service. In that year he was made an alderman and three years later Mayor of Greeneville. In 1835 he was elected to the Tennessee legislature and in 1843 to Congress, where he served until 1853. In that year and again in 1855 he was elected Governor of Tennessee, and in 1857 was chosen Senator. Although a Democrat, he was the only Southern member of Congress to refuse to secede with his state and he continued in the Senate until 1862, when Lincoln appointed him Military Governor of Tennessee. In 1864 he was nominated and elected Vice President, it having been felt that the nomination of a Democrat from a border state would bring strength and solidarity to the Union ticket.

Johnson was a man of outstanding intelligence, independence and courage, but he was lacking in humor and tact. To his lasting misfortune, he had been under the influence of liquor at his inauguration as Vice President. He had made the long trip from Nashville to Washington while recuperating from typhoid fever, and he is reported to have asked Hannibal Hamlin, the outgoing Vice President, for a drink of whisky to give him strength for the ceremony. His inaugural speech was so alcoholic that Senator Sumner ostentatiously buried his face in his hands. Many prominent persons closely associated with Johnson have attested to the fact that he was a man of temperate habits but his "slip", as Lincoln called it, gave credence to the later repeated characterizations of him as a drunkard.

Johnson's accession to the Presidency was at first welcomed by the Radicals. Representative George W. Julian, of Indiana, later a member of the House committee to declare articles of impeachment against Johnson, gave the following description of the Radical caucus held immediately after the death of Lincoln:

> While everybody was shocked at his murder, the feeling was nearly universal that the accession of Johnson to the Presidency would prove a God-send to the country.

Johnson was known to be hostile to the leaders of the Confederacy and it was thought that he would be harsh in his attitude. This assumption overlooked the fact that he believed in President Lincoln's policies and, as Military Governor of Tennessee, had carried the responsibility of putting them into effect. His views were summarized in the statement that the prostrated South "must be nursed by its friends, not smothered by its enemies".

Johnson became President on April 15, 1865, and Congress was not due to reconvene until December. In furtherance of Lincoln's plan, Johnson threw himself into the task of restoring the Southern states and by the end of July measures had been put into effect for self-government in all of them. These measures made suffrage dependent upon the local requirements that had been in effect on the date of secession, but excluded individuals unable to

qualify for amnesty. The terms of amnesty were substantially those of Lincoln.

The first postwar reconstruction measure was originally drafted by Edwin M. Stanton as Secretary of War. Stanton had agreed privately with Senator Sumner to extend the suffrage to Negroes and sought to accomplish it by a provision making "loyal citizens" eligible to vote. The significance attached to this phrase did not become clear until Stanton was asked to explain it at a Cabinet meeting. Johnson did not adopt Stanton's plan.

Edwin M. Stanton had been appointed Secretary of War by President Lincoln during his first term of office. He was a lawyer of great energy and ability. For almost two years he gave outward evidence of loyalty to Johnson, although at the same time participating in the secret councils of the Radical leaders. As Secretary of War he occupied the key Cabinet position with respect to reconstruction. The Army was in control of the South and was necessarily the instrument for putting into effect any plan for its government, whether originating in Congress or the White House.

Congress Makes Open Break with President on Reconstruction

By the time that Congress reconvened in December, 1865, the Radicals were thoroughly alarmed by the President's actions and had conferred on means to counter them. By prearrangement, the leaders came to Washington early and a Republican caucus was held in advance of the meeting of Congress. At this caucus, Thaddeus Stevens, of Pennsylvania, the leader of the House, secured agreement on a plan which, among other things, committed the Senate and the House not to admit the elected representatives of a Southern state until Congress had pronounced its reconstructed government valid and satisfactory. This plan was promptly adopted by Congress and the strongest of the Radical leaders were appointed to a joint committee of six Senators and nine Representatives which thereafter dominated both Senate and House in all matters relating to reconstruction.

The conflict between the President and the Radical Republicans was now open and irreconcilable. The President regularly vetoed Radical legislation and Congress almost as regularly repassed the measures over the veto. This required a two-thirds vote, but the anti-Administration Republicans already had this margin in the House and they obtained it in the Senate by the expulsion of Senator Stockton, of New Jersey, and by the admission of Nebraska to statehood. An effort was made to increase the margin by admitting Colorado as well, but this did not muster enough votes to pass over the veto. Colorado's population was very small, and the only vote taken in the territory had rejected statehood. Later, during the congressional elections of 1866, Johnson made the mistake, as it turned out, of trying to carry the issue of reconstruction to the people. He was badly outmaneuvered by the Radicals and the result of the elections was to give the anti-Administration Republicans overwhelming control in Congress, amounting to well over two-thirds in both houses.

Space does not permit a blow-by-blow account of the ensuing warfare between President Johnson and the Radical Republicans, but three of the measures of Congress, all passed on March 2, 1867, are of special significance in connection with the later impeachment: (1) the Reconstruction Act, (2) the War Department Appropriation Act, and (3) the Tenure of Office Act.

(1) *The Reconstruction Act* divided the Southern states into five military districts, each to be governed by an Army officer. It and its supplements had the effect of enfranchising the Negroes and of disfranchising the whites who had supported secession.

(2) *The War Department Appropriation Act* of March 2, 1867, made it a misdemeanor for the President to issue any military orders to the Army except through the General of the Army, or to relieve the General of his command or assign him to duty elsewhere than at Washington, save at his own request or with the previous approval of the Senate. This legislation was in the form of a rider to the Appropriation Act and had been dictated secretly by Stanton to Representative Boutwell, as later disclosed in Boutwell's *Reminiscences*. In practical effect it made Secretary of War Stanton the key individual in reconstruction, through his control over the General of the Army.

(3) *The Tenure of Office Act* required the approval of the Senate to the suspension or removal by the President of civil officers who had been appointed with its consent.

These Acts fit together like a jigsaw puzzle. The first gave the Army control over reconstruction. The second put the Secretary of War in control of the Army, to the exclusion of the President. And the third purported to give the Senate control over the removal of officers appointed with its consent. But did this last protect Edwin M. Stanton as Secretary of War? This was destined to become the crucial issue of

Harris & Ewing

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the impeachment proceedings. Let us accordingly look further into its background.

When the Tenure of Office Act was under consideration in the Senate it was felt that cabinet members occupied such an intimate relationship that the President should not be forced to retain individuals in whom he had lost confidence. Accordingly, the Senate excluded cabinet officers from the protection of the original bill. The House thereafter amended to cover cabinet officers, the Senate refused to concur, and the bill was sent to conference.

The Senate was represented on the conference committee by Charles R. Buckalew, of Pennsylvania, John Sherman, of Ohio, and George H. Williams, of Oregon, and the House by Robert C. Schenck, of Ohio, Thomas Williams, of Pennsylvania, and James F. Wilson, of Iowa. Senator Buckalew was a Democrat; the other five were anti-Administration Republicans. Representatives Williams and Wilson were later among the seven House Managers in the impeachment proceedings.

The Conference Committee inserted the following proviso in the bill with respect to cabinet officers:

> Provided that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, should hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

This proviso had been drafted by Representative Williams and, in reporting the measure to the House of Representatives, Schenck said "It is, in fact, an acceptance by the Senate of the position taken by the House." In adopting the Act, the House believed that it was protecting Stanton, on the theory that Johnson was merely serving out Lincoln's term rather than a term of his own.

The Senate thought otherwise. There, James R. Doolittle, of Wisconsin, a pro-Johnson Republican, attacked the proviso as special legislation for the avowed purpose of protecting the Secretary of War. At the same time he pointed out that its language would not achieve that result inasmuch as Stanton had been appointed by Lincoln during his first term, whereas the amendment protected cabinet officers only "during the term of the President by whom they may have been appointed, and for one month thereafter". Answering Doolittle, Senator Sherman, who had been on the conference committee, stated

> We do not legislate in order to keep in the Secretary of War. . . . That this provision does not apply to the present case is shown by the fact that its language is so framed as not to apply to the present President. The senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State. And if I supposed that either of these gentlemen was so lacking in manhood, in honor, as to hold his place after the politest intimation by the President of the United States that his services were no longer needed, I certainly, as a senator, would consent to his removal at any time, and so would we all.

The bill as amended in conference was thereupon passed and sent to the President.

At the Cabinet meeting held to consider the bill, all members of the Cabinet expressed the opinion that it was unconstitutional. Secretary of War Stanton was so outspoken on the subject that Johnson requested him to draft the veto message. He pleaded inability to do so, but offered to assist Secretary Seward, the Secretary of State, in preparing a draft, which he did. The Act was passed over the President's veto on March 2, 1867. During this period Stanton was still making a show of loyalty to the President, although diaries and documents later coming to light have proved conclusively that he was working hand in glove with the Radical leaders.

The Tenure of Office Act specifically provided that its violation would constitute a "high misdemeanor", this statutory language being drawn from Article II, Section 4 of the Constitution providing that:

> The President . . . shall be removed from Office on Impeachment for and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors.

The possibility of impeaching the President was already receiving prayerful consideration. Under the Constitution, it is the function of the House of Representatives to initiate and of the Senate to try all impeachments, and two preliminary but unsuccessful attempts were made to bring about action by the House.

On January 7, 1867, Representative James M. Ashley, of Ohio, introduced a resolution impeaching the President and authorizing the Judiciary Committee to inquire into his official conduct. Ashley and other members of the committee rummaged through bales of captured Confederate documents and enlisted the aid of professional witnesses in an effort to develop evidence of conspiracy between Johnson and President Jefferson Davis of the Confederacy. They were tantalized by another professional witness, already convicted of producing perjured testimony, who promised that if released and financed he could obtain evidence incriminating Johnson in the assassination of Lincoln. All manner of rumors were investigated, but nothing of consequence was uncovered and on June 3, 1867, the Committee voted five to four against impeachment. Later, one of the members of the Committee changed his mind, and the matter was carried to the floor of the House but, on December 7, 1867, was voted down 108 to 57. This ended the first attempt at impeachment.

During the time that the House had been investigating the possibility of impeachment, other preparations had been under way in the Senate. On March 4, 1867, Benjamin Franklin Wade, of Ohio, was elected President pro tempore of the Senate. Although a man of limited ability, Wade was one of the staunchest of the Radical Republicans and had collaborated with Henry Winter

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The American Bar Center:

A Testimony to Our Faith in the Rule of Law

by Robert H. Jackson • Associate Justice of the Supreme Court of the United States

■ In his address at the laying of the cornerstone of the new American Bar Center on November 2, Mr. Justice Jackson compared the Western ideal of the rule of law with the barbarian's reliance upon force, recently revived in the modern totalitarian states. The latter part of his address took the form of a legal creed that may well survive the building whose erection it marked.

■ Cornerstones are commonplace unless they gain distinction from the vision and faith of those who lay them. Our vision today is of an American Bar Center which will focus the influence and pilot the activities of the largest association of lawyers in the world. This influence literally saturates American intellectual life. Generally, in each community its members are among the most respected and articulate leaders in every field of thought and action.

The special competence and responsibility of the Bar is in the administration of justice under law, because the private law office is the very cornerstone of that system. Only through it can the citizen learn the increasingly complicated rules which bear upon his peculiar rights or obtain effective access to any except minor courts. To these offices each day come countless men and women in grief or greed, in anger or distress. While the Bar is not free from that low cunning which gives it the reputation of promoting strife for its own profit, as a whole it carries to litigation few of the cases it is offered, and our law offices settle many times the number of controversies that are settled by the courts.

But there are occasions when the lawyer will be false to his client and his profession if he is not ready to risk his own standing on a hard and perhaps unpromising contest. Rights, whether given by constitution, statute or common law, are but scraps of paper unless a lawyer will go into the courtroom and there give concrete effect to the abstract word. Von Jhering goes so far as to say, "All the law in the world has been obtained by strife." And he adds that "Every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert and defend it." Thus the Bar has a considerable part in lawmaking, and the prestige and authority of law as a social force at any time is very much what the lawyers make it.

Today it weighs heavily upon the hearts of men who love their profession that many conditions conspire to frustrate achievement of an effective rule of law. The events which have made the deepest impression upon the thought of the first half of our twentieth century are two world wars which distorted or extinguished more lives through scientific slaughter of combatants and calculated killing and torture of civilian populations than any wars of history. Our era has seen probably as many as six million men, women and children put to death for no offense but having been born of a different race. It has reintroduced forced labor, on a scale never before witnessed, as a device of dictatorship. It made the concentration camp, whose scientific cruelty puts the ancient torture chamber to shame, one of the most populous institutions of our time. These evils in a large part of the world are still carried on in the second half of our century.

Paradoxical as it may seem, in this age of general education our nation is plagued with unprecedented juvenile delinquency, gangsterism and shocking crimes followed only by long-delayed punishment or by none. The administration of our criminal law, from one cause or another, is a humiliation and a discredit to our profession and our country. And even civil justice is still delayed or denied, and often beyond the reach of deserving men and women. We cannot fairly disagree that specific laws in many fields are inadequate or obsolete, that lawyers ofttimes

fail to live up to their professional standards and courts do not measure up to their responsibilities. The lay public is quite justified in viewing these conditions as a challenge to the leadership of the Bar.

But what seems to me more ominous is the tendency to skepticism as to whether a struggle for improvement in the law is worth while, the doubt that reliance can be placed upon any law for the control of force or the determination of conflicts. Indeed, there is a cult which thinks meanly of our calling and tutors youth that "realistically" there is no law except the will of those in authority, that judgments of the courts express nothing deeper than the personal preference of the judge, and his opinions merely manipulate words and symbols to rationalize or dissemble his predilections. Our people, appalled by the magnitude and stubbornness of the manifestations of lawlessness, tend to sink into a suicidal fatalism that accepts violence, crime, injustice and misgovernment as part of the natural and changeless order of things.

The most revealing symptom of a declining faith in reason and legitimacy as power in the world is evidenced by the zeal with which people everywhere are turning their minds to accumulating instruments of physical power. The titantic struggle for military superiority now being waged between nations is on the assumption that material, not moral, force will determine their destinies. No nation is more forceminded today than our own. The people are burdened and unhappy under it, but they do not know how to withdraw because the stakes seem to be so high that the dreadful game must be played on to fortune or ruin. And within each nation the internal struggle for power between classes, creeds, races and ideologies tends to take on the same uncompromising character.

Faith in the Law Is Our Last Best Hope

The question we face today is whether the profession which we envision as centering here will have any saving faith to offer to an anxious and bewildered people. I think it has. A matter-of-fact and practical profession has courage and idealism to assert its belief in law and in the rule of law as the last best hope for an orderly and tranquil nation and for a peaceful world.

When we speak thus of law, we are not concerned with the merits or defects of any particular statutes, regulations, decisions or procedures. We are speaking of a reasoned and intelligible system of thought about the adjustment of life's relationships between man and his neighbor growing out of his family, his state, his land, his personalty, his contracts, his injuries. The general ideas of law that lie back of all detailed laws comprise a system of legal philosophy older and more profound than legislation, on which we base an ever growing body of legal learning which approaches a science of civilized life. Foundations for this law were laid long ago by men of our calling who waged their contests in the Roman Forum or in Westminster Hall.

This Western law rejects the teachings of fatalism and presupposes that normal men have free wills and, since they may choose, that they may be held responsible for the results of their choice. It always has been fundamentally irreconcilable with any theory of determinism, economic or otherwise. The concepts of free will and responsibility are the premises on which we have built our entire doctrine of duties and liabilities, of law and its sanctions.

The ground for our confidence in the rule of law is its history through fifteen centuries since Justinian's great series of compilations which preserved Roman law for posterity. While long dormant, its influence since the eleventh century in moulding intellectual, social and political life on this planet would be hard to overestimate. Despite endless modification of component rules and doctrines, it has retained its distinctly Roman character and been the groundwork of contemporary civil law. It furnished the main principles for Napoleon's Civil Code, a "combination of fruitful innovation and ancient usage" which became the most widely copied legal work since Justinian. Thus Rome furnished a fundamental philosophy for the law today being administered in France and Holland and their possessions, and in Germany, Italy, Scotland, Switzerland, Quebec, South Africa, all of Latin America and our own Louisiana.

The common law, I need not remind you, had a later origin. Nurtured by our parent profession in England, it spread with the mother tongue to the United States, British Canada, Australia, India and New Zealand. Little aided by legislation, it flourished as a consensus of experienced judicial opinion and made its way because of its reasonableness and workability in settling the ever-present conflicts in society.

At times, the integrity of both systems has been threatened by the extravagance of revolution and by the distortions of despotism. But it is reassuring that each not only survived but actually continued to shape the underlying structure of society during the very regimes which threatened it. The common law, although yielding on important matters, as a system continued to rule England during Stuart absolutism, a Cromwellian Protectorate, a Restoration, and a limited monarchy. Carried to this country, it flourished during a Colonial period, a Revolution, a Confederation, a chaos of separate states, and a Union. Civil law has undergone even greater vicissitudes. It served a Louis XIV, endured the French Revolution, emerged as a dominant influence in Napoleonic codification, and adapted itself to both Teutonic and Latin tradition. Such history is convincing that our two great Western legal systems do protect ultimate values which meet the natural needs of society, that they answer some deeper need than expediency and utility, and by inherent worth can hold society together by ruling the hearts and minds of men.

Law, in this sense, must not be confused with the activities and interests which it permeates. Law is not government nor is it politics, though it is closely related to political science and receives particular "positive" rules from legislation. Our law is not religion, although many of its finest precepts are drawn from religious teachings. Law is not economics, though it is deeply involved with economic problems; nor is it sociology, though its chief concern is with the welfare, health and well-being of society.

When we consider the body of substantive principles we call law in this separate sense, what stands out is not differences but similarities between the systems. We must except public law, which is more influenced by the regime of the hour, and procedure, on which any two lawyers from the same school are certain to disagree. But basic ideas of just dealing and civilized living are so strikingly alike that we may foresee a mutual understanding and co-operation between the professions of the Western world greater than has existed in the past. And if a peaceful and stable international order ever is reached, it is not rash to predict that it will result from acceptance by the professions of all nations of an international rule of law as a curb on lawless power in control of great states.

Power Always Resists the Restraints of Law

It is the nature of power always to resist and evade restraints by law, just as it is the essential nature of law, as we know it, always to curb power. Our Bill of Rights signifies victory of law over power. Perhaps the decisive difference between Communist legal philosophy and that of the West is that our law puts rational restraints upon the use of coercive power by those in authority, while, as Vyshinsky points out, Soviet law is only "expressing the will of the dominant class", to be enforced upon all by the "compulsive force of the state". Thus their law, instead of controlling the prevailing authority, is merely another implement—mainly, we may believe, a propaganda implement in the hands of the authorities.

The conception of law as a brake on power is one of the chief contributions to civilization made by our profession, which has exerted more than its proportionate influence in constitutional conventions, legislative bodies and executive departments, as well as in courts. But it is largely due to these lawyers that all three branches of our government have been conducted on the same assumption that they exercise power under, not above, the law. Thus, these lawyers have contributed mightily to a cohesion and moderation in our federation without which it is doubtful if our system of dispersion of powers would prove workable.

May we not today usefully summarize our creed? It must, of course, be a statement of ideals which, like all ideals, can be approached only slowly and never reached, yet are nearly enough attainable to enlist and inspire a profession of practical and sophisticated men of the world.

We believe in law as an intellectual discipline capable of directing the thought and action of law-trained men and, through their leadership, of guiding men and masses away from violence, vengeance and force and toward submission of all grievances to settlement by fair legal procedures. We believe in it as an authority to which the just judge, so far as humanly possible, will yield his personal prepossessions, passions and interests.

We believe in law as a growing and progressive science of civilized life, not as a closed doctrine like the law of the Medes and Persians. Our profession is duty-bound to supply bold and imaginative leadership to bring and keep justice within the reach of persons in every condition of life, to devise processes better to secure men against false accusation and society against crime and violence, and to preserve not merely the forms of constitutional government but the spirit of liberty under law as embodied in our Constitution.

We believe that the only permissible use of coercive force is under the law. No device of compulsion by public authority or private advantage is tolerable unless authorized by the law of the land and executed by procedures that conform to strict concepts of due process of law.

We believe in a strong and independent judiciary charged with adjusting and applying law to conditions of our time, with balancing the values of continuity against those of improvement, certainty against adaptability, liberty against authority. By independence of the judge we mean more than freedom from subservience to other branches of government; we mean the largest freedom humanly attainable from his own partisanship, class-interest, political bias or group pressures. We maintain our right respectfully to criticize what we may think errors of honest judgment by our courts and judges, but we can show no leniency toward judicial partisanship, faithlessness, carelessness or irresponsibility.

We believe in an independent Bar, free not only from government control, but intellectually independent of client control. In the client-and-attorney relation the client is not a master, the lawyer is not a mere hired hand—he is an officer of the court, with a duty of independent judgment in the performance of his professional service and under a duty to serve all sorts and conditions of men.

We believe it a duty to champion all fundamental rights under the law, but we recognize a special trust and competence to safeguard every man's right to fair trial, on which every other right is dependent. We cannot approve any use of official powers or position to prejudice, injure or condemn a person in liberty, property or good name which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth, safeguards without which no judgment can have a sound foundation. We cannot condone any use of publicity to stir either hatred or sympathy for those on trial, or to

arouse public opinion upon the basis of rumor or statements not verified by oath and tested by cross-examination.

We believe respect and understanding are due systems of law other than our own, however different. We recognize them as the efforts of dedicated men under other conditions and influences to reach justice as a goal. We welcome opportunity for conference, comparison of experience and doctrine, and the fullest intercourse and fraternity with our professional brethren in other lands. We approach them and their work in a spirit of humility and awareness of our own failures and shortcomings and not as crusaders for uniformity or standardization in disregard of the differing traditions, cultures and conditions of peoples and nations.

We believe that the great purpose of achieving a peaceful world is best approached through a strengthening and extending of international law and international legal institutions along the lines of their development in the West. We believe the legal processes of adjudication and arbitration offer an honorable and effective alternative to war as a means for correction of just international grievances.

It is in support of these ideals that this American Bar Center will marshal the united wisdom and influence of our numerous and powerful profession.

A story that I have often told seems especially apt today. A visitor at a cathedral under construction questioned three workmen as to what they thought they were doing. The first muttered, "I am making a living." The second gave the uninspired reply, "I am laying this stone." The third one looked up toward the sky and his face was lighted up by his faith as he said, "I am building a cathedral."

What are we doing today? We are building a cathedral to testify to our faith in the rule of law.

Former President Robert G. Storey States the Objectives of the Center

■ The American Bar Center will be the intellectual as well as administrative headquarters of the American lawyers, and has one principal mission—to serve the public good. The laying of the cornerstone is concrete evidence that the buildings composing the Center will be completed at an early date. It will be dedicated in August of next year at the next annual meeting of the American Bar Association in Chicago.

The development of the Center involves two stages: first, financing and completion of the physical plant. The lawyers of the United States are now on the "home stretch" of the financial campaign. One of the buildings comprising the Center will be the Administrative Headquarters of the American Bar Association and affiliated organizations; the other, the Bar Research Center, which will house the library and research facilities.

The second step is the launching of a comprehensive program of service and research in bar association activities and objectives. The first research project of the American Bar Center has been approved and is now in progress. It is directed by the over-all and long-range Committee on Administration of Criminal Justice under the leadership of Supreme Court Justice Robert H. Jackson. Dean Albert J. Harno, also a member of that Committee, emphasized the choice of the criminal justice project when he said:

> Since popular discontent with the law today centers in the criminal law and its administration, it is befitting that the first major research project approved by the new Center bears on criminal law administration.

The Research Center of the American Bar Foundation will have endless opportunities for service to the legal profession and the public through legal research. The Ford Foundation has made a planning grant of $50,000 for the use of the Committee on Administration of Criminal Justice, and we believe this is a forerunner of similar grants from great foundations to finance worthy research projects relating to the long-range objectives of the American Bar Association and appropriate public law questions as approved by the American Bar Foundation.

In addition to these studies of matters of current public legal interest, the American Bar Center will serve as a clearing house for the similar research activities of other groups, and especially of state and local bar associations, legal centers and law schools. At the present time there is no agency in the nation which provides this co-ordinating function. Good ideas and the practical results of sound legal research ought to be widely disseminated. Most state and local associations now publish bulletins or journals of their activities. The assembling and cataloguing of these records of bar association activity will be an important function of the American Bar Center. Local and state bar associations considering new projects may then write to the Center requesting information on similar efforts and the results thereof, by other bar associations. Ultimately this clearing service will be extended to include the principal countries of the free world, as well. The American Bar Center then will become a nerve center for all the organizations of lawyers, at work in freedom's cause, throughout the free world.

Finally, this Center is destined to become a depository of many noble

and precious books and documents. Over the years it will receive charters of bar organizations, certificates of merit, citations of service, publications of research projects—such as the Survey of the Legal Profession—and books, unusual and important court records, trial briefs and documents. We may expect that many lawyers and bar associations will utilize the American Bar Center as a permanent custodian for such legal gems.

Summarizing, the aims and purposes of the American Bar Center are to provide:

1. A permanent *home* and administrative *headquarters* for the American Bar Association, its several branches and affiliated national legal organizations.

2. A *research library* for (a) all bar association books, publications and materials; appropriate reference books and legal gems; and (b) units and facilities for conduct of legal research.

3. A *clearing house* for all research projects of law schools, universities and other institutions so that all legal research may be co-ordinated, inventoried and properly disseminated, in order to prevent duplication.

4. An *intellectual center* for practicing lawyers and bar association representatives. It will be a workshop for lawyers, judges, laymen, government officials and professors of law, to evaluate many legal research projects and to make combined recommendations for the constant review and improvement of our legal profession and the administration of justice.

5. A center where foreign lawyers may visit and study the organization and work of all bar associations and our constitutional system of government. Such an approach may encourage bar associations, governments and universities of other nations of the free world to deposit their legal and governmental publications in our research library. Such friendly co-operation should contribute to the improvement of international law and a sympathetic knowledge of our independent judicial system.

Yes, the American Bar Center is a great step forward in the history of the organized Bar of the United States. But it is a step forward only because it offers the opportunity for greater service by the lawyers of America, through their many associations, not only to the legal profession but to the people of America.

This *is* a dynamic age in which we live: and law, too, must partake of its dynamic quality. Lawyers are conservative people, it is true. But conservative only in the interest of a well-ordered society. Lawyers do not oppose change—they oppose only disorderly methods of transition. We need not surrender these principles in order to meet the challenge of our times. But as a profession we do need to devote greater effort than in the past to improve law and the administration of justice for the betterment, and the security, and the happiness, of mankind.

The President's Page

(Continued from page 3)

House of Delegates at the Mid-Year meeting in February, 1952, and reads as follows:

BE IT RESOLVED: That the American Bar Association express its approval of the manner in which the investigation and hearings by the present Committee on Un-American Activities of the House of Representatives and the subcommittee of the Senate Judiciary Committee on the Internal Security Act are now being conducted and we commend said committees for their continuing inquiry into the activities of the Communist Party, its members and followers, in order to establish a basis for appropriate legislation; and

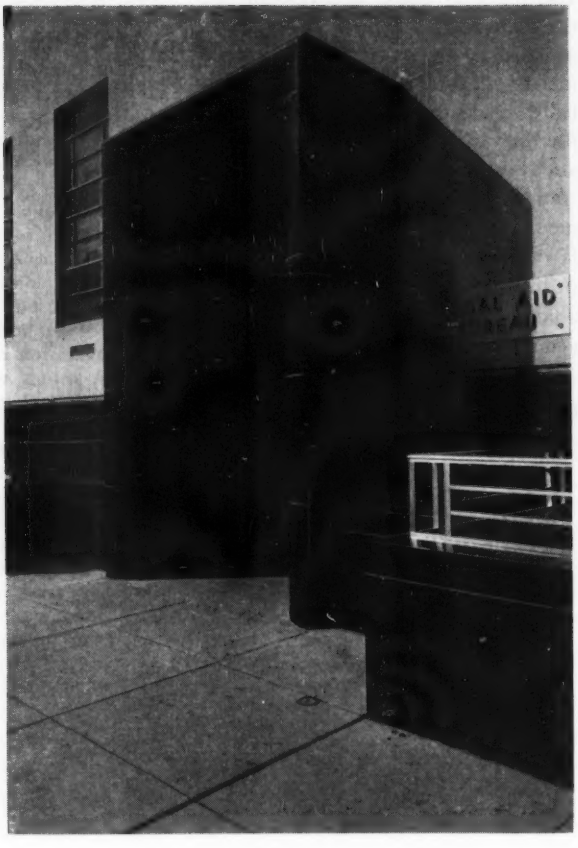
BE IT FURTHER RESOLVED: That the American Bar Association lend its moral support and encouragement to any person now or heretofore a member of the Communist Party or who in any wise embraced the doctrines of Marxism-Leninism and who is now desirous of coming forth and testifying under oath in order to expose its conspiratorial aims and purposes.

I doubt whether any organization has taken a more positive and effective stand against Communism than the American Bar Association. The excellent brief prepared by the Committee on Communist Tactics, Strategy and Objectives has received extensive circulation and wide acclaim. We recognize our duty, so well expressed by this Committee, to assume leadership "in upholding our Constitution and our form of government by free men; and in exposing the dangers of Communism and its activities through action and front organizations and Communist collaborators". Likewise we recognize our duty as lawyers in protecting individual rights and liberties guaranteed by our Constitution. As President Eisenhower reminded us in his message to the last Annual Meeting, "the lawyer is the guardian of individual liberties guaranteed under our Constitution and their defense is one of the main objectives" of the Association.

We have a challenge to leadership in the all-important task of maintaining a proper balance between government and men, between individual rights and national security. The study contemplated by the American Bar Association with respect to procedures in congressional investigations will be undertaken in accordance with these obligations. We hope that it may make a significant contribution to this important problem and will be helpful to Congress in its necessary and desirable investigations.

The study is undertaken in a cooperative and not an antagonistic spirit. It will be thoroughly objective and leaders in both Houses of Congress of both parties will be consulted. As Mr. Woods so aptly expressed it, the study is designed to protect an essential activity.

Baltimore Blazes a Trail



Entrance of Legal Aid Bureau
Baltimore, Maryland

■ The new offices of the Legal Aid Bureau of Baltimore were dedicated October 29, 1953.

The dedication ceremonies were a part of the proceedings of the National Legal Aid Association which met in annual conference in Washington, D. C., during the last week of October. The ceremony was preceded by a reception and a buffet supper tendered by the Board of Directors of the Bureau to visitors from the Washington meeting, the leaders of the Baltimore Bench and Bar, the City administration and community services. The reception and supper were followed by an inspection of the new offices which had been occupied on August 18, 1953. They occupy the third floor of the new Peoples Court Building—approximately 4800 square feet of space—and consist of a reception room served by two elevators, an office for the screening clerk who interviews clients to determine eligibility, the clerical office, with a storage room for files and materials, the counsel's office, which is large enough to accommodate committee and staff meetings, seven attorney's offices, a library and a large room to accommodate the students of the University of Maryland Law School, who take their practice work in the Legal Aid Clinic operated by the Bureau. The entire office is equipped with the latest design of lighting, heating and air conditioning equipment.

Mayor Thomas D'Alesandro, Jr., presented the keys of the offices to Eli Frank, Jr., President of the Bureau's Board of Directors, and explained that the City of Baltimore was providing the new quarters for the Bureau in recognition of the im-

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The Legal Aid Bureau of Baltimore was organized in 1911 by the Federated Charities of Baltimore, a predecessor of the present-day Community Chest, in co-operation with the Bar Association of Baltimore City. Co-operation between the Bureau and the bar associations has always been close. At present the two Vice Presidents of the Bar Association of Baltimore City, the President of the Junior Bar Association and the President of the Women's Bar Association, are all ex officio members of the Bureau's Board of Directors.

Toward the end of 1928, the Bureau was reorganized as an independent corporation and it then became an agency of the Community Chest. It began functioning in its reorganized form on January 2, 1929, and all records of the present office date from that time on. Soon after the Bureau was reorganized, it was given free office space by the City of Baltimore in its Department of Public Welfare building. It retained those quarters for about a decade, until the expansion of the Department of Public Welfare required additional space and the Bureau was forced into private quarters.

However, long before the Bureau rented its own space, plans had been in the making for the building of a new courthouse by the city. It was originally planned that this building would house the People's Court (the small claims court), the Juvenile Court and the Legal Aid Bureau. Plans had been prepared, but building was delayed. World War II delayed building still more. In the meantime, there was a reorganization of the Juvenile Court and it became a part of the Circuit Court of Baltimore City, one of the equity courts. The Juvenile Court, accordingly, no longer needed space in the new building.

The 1938 report of the Governor's Commission on the reorganization of the People's Court recommended that, because of the Legal Aid Bureau's "intimate contact" with the People's Court, the Bureau should be given quarters in the proposed new People's Court Building and the Bureau, since that time, has been included in all the architect's plans prepared for the building. When the Bureau rented its own offices in 1941, it was with the understanding that as soon as the new People's Court Building was constructed, the Bureau would be given space in that building. Renting was, therefore, always regarded as a temporary expedient.

Construction began in 1951 and the Bureau was allocated the third floor of the building. Throughout the entire period of construction, there was pressure on the City Administration to make changes in the plans and allocate the space provided for the Bureau to other city agencies. However, the Administration, under the leadership of Mayor Thomas D'Alesandro, Jr., stood by its commitment to provide the Bureau with desirable quarters.

Entering Elevator

Receptionist

Meeting an Attorney

portant part which the Bureau played in the administration of justice in the city. Baltimore, he said, was the first community to include a Legal Aid office in its building plans for a new courthouse, and expressed the hope that this might be a precedent for other cities.

The dedicatory address was made by Harrison Tweed, of the New York Bar, President of the National Legal Aid Association. Mr. Tweed said in part:

I am honored to be here today on this happy occasion—the dedication of the new Baltimore Legal Aid Bureau offices in the Peoples Court Building. This symbolizes the collaboration of the community and the government in offering efficient Legal Aid services in an attractive atmosphere. I am certain that this accord will be acclaimed not only by those who avail themselves of the service offered, but by all citizens of Baltimore and all those interested in the administration of justice everywhere. . . .

There are certain things that every man must have. It is always preferable that he be able to secure them by and for himself. It is a sound social philosophy that so far as possible each man be born, brought up, educated and trained to take care of himself. But man is an imperfect creature—even women have their faults. So it is not everyone who on his own initiative and effort can have even the necessities of life.

Among savages, those who cannot secure food for themselves perish. In somewhat more civilized communities, friends take care of such rock bottom needs as nourishment.

From this neighborly help by and to individuals, organized community help has developed. And more or less concurrently government came to appreciate its obligations although the proper extent and limits of them are still debatable.

Thus there are four sources of help, which I will state in the order of my preference: the individual himself—his personal friends and neighbors—the community—and the government. It is right that government aid should be postponed as long as there is chance of help from other sources and be given only in cases where the community cannot be expected voluntarily to meet the need. It is still a principle of American life that the less government the better.

There is, of course, more danger to freedom if help comes from the government rather than from friends or the community. Government has a way of demanding and securing a *quid pro quo*. With the passage of the years and the observation, experience and education they have brought, there has come a greater appreciation of the obligation of government to help its citizens when other means fail and less fear of the results. There is, however, definitely a limit beyond which government subsidy becomes a danger to individual freedom.

Extremes are always dangerous. This is true in all things. We like to eat but it is advisable not to overeat. We like to have a drink or two but too many are not good for us. Spring and autumn are our favorite seasons when the weather is not too far in either extreme of hot or cold. The extremes in government are savagery and sovietism.

It is a matter of balance. We are always walking a sort of tightrope. If we become disorganized and irresponsible we suffer for lack of system and authority. If we let government become too powerful and pervasive we lose our liberty.

The history of Legal Aid points up some of these distinctions. It has never been debatable in this country that every man and woman is entitled to justice and that to give it is not to give charity. What do we

mean by justice? We mean in simplest terms the opportunity to submit our claim or our defense against a claim to a judge—a day in court. The claim may be for money—for rent or the price of an article sold, or for reimbursement for damage done by negligence. Those are civil claims. Or it may be a claim by the state to punish the individual for some offense against the community.

Whatever the nature of the claim, the citizen will need help. His situation is one in which he cannot take care of himself and ought not to be expected to do so. He needs a lawyer. And the best definition I know of a lawyer is that he is a man who helps people. No one but a lawyer can give help in court or in legal problems.

But just because lawyers help people does not mean that they do not have to pay grocers and educate their children and dress their wives. So it is only fair that the man who has the help of a lawyer should pay for it.

This works out all right if the individual who is in legal trouble has enough money to pay a lawyer. But, as we assumed at the start, there are many who don't.

How is this need which the individual cannot meet himself to be met on his behalf? A century ago it was met, if at all, by a lawyer who was a friend and neighbor. Today in some rural parts of this country where everybody knows everybody else, it can still be met in this same way. And that is as it should be, for the demand on each lawyer in the small community is a modest one and his sacrifice will not be great. But the communities in which everybody knows everybody else are few—and growing fewer and fewer.

Even the sizable towns in which the citizens know the good lawyers and may appeal to them for help are not many and their number is diminishing. Far more people live in the large cities and the metropolitan or county centers of 100,000 or more, where people are absorbed in their own affairs and confine their friends to a small circle.

There the dilemma of the man in legal trouble is complete. He knows no lawyer to turn to and he does not want to turn to a stranger—for two reasons. First, he does not trust someone he does not know, and second, he does not want to impose upon a stranger. In these communities we have reached the point that help must come from community organizations or from the government. As was to have been expected, help came from a voluntary community organization. The first Legal Aid service in this country was in New York City in 1876. It was given by a German organization, *Der Deutscherrechtsschutzverein*. It grew until today thousands of lawyers and laymen are glad to finance this organized help to the extent of something like $400,000 a year. That sounds like a lot of money, but in a city of 8,000,000 it is only about five cents for each citizen.

Many other cities meet the need in the same or in a similar way. Baltimore is an example of a community which accepts its responsibility and discharges it efficiently and well, through the Community Chest. Many other cities do likewise. There are now about 150 Legal Aid organizations in the country and they took care of about 250,000 people last year. . . .

We can look forward with reasonable assurance to the time in the near future when the little fellow who cannot afford a lawyer will be taken care of by voluntary community organizations except in the criminal courts. . . .

When we turn there we find the situation very different. In only six cities do the Legal Aid Societies take care of the indigent defendant who has been acused of crime, and in only a very few states are there so-called public defenders to do so. The difficulty is the cost, which exceeds what can presently be expected of the community through voluntary giving. . . .

As I said at the beginning, there are certain things that a man must have. Justice is one of them. If he cannot pay for it himself and neither friends nor the community provide it for him, then there is no alternative—the government must provide it for him. It will then become the duty of all of us, and particularly of those of us who are lawyers, to see to it that what the government gives is true and impartial justice. . . .

Following Mr. Tweed's address, the Maryland Department of the Veterans of Foreign Wars presented the Bureau with an American flag for its reception room. Presentation was made by Harry Singerman, a past Commander of the Maryland Department of the Veterans of Foreign Wars and now serving on the National Commander's Committee of Legal Advisers.

The flag, he said, was presented in recognition of the fact that the Legal Aid offices of the country exemplify equality under law and protection of the rights of needy individuals and minorities. He expressed the hope that the flag would be an inspiration to those who worked at the Bureau and would symbolize to the Bureau's clients the essential characteristics of our American democracy in which legal aid offices play such an important role.

During the ceremonies, Mr. Frank, President of the Board, who presided, made special mention of H. Hamilton Hackney, first counsel of the reorganized Bureau, under whose leadership plans for the Bureau's location in the new building were conceived, and of T. J. S. Waxter, Paul F. Due, Joseph Bernstein, J. Martin McDonough and J. Gilbert Prendergast, Past Presidents of the Bureau, and Judge William C. Coleman, Senior United States District Judge for the District of Maryland, Vice President of the Board, who has been associated with the Bureau constantly since its inception, having been a member of the first executive committee in 1911.

Once Upon a Time:

Some Memories, Reflections and Anecdotes

by Eustace Cullinan • of the California Bar (San Francisco)

■ Mr. Cullinan's reminiscences remind us again of the vast changes that have taken place during the first half of the twentieth century. Even the style of practice has changed, and the silver-tongued orator with the tall hat and frock coat who once represented the legal profession in the public mind is gone forever. Mr. Cullinan's article contains both wisdom and wit—there were, for instance, the contents of the brief case that won the gratitude of the Lord High Chancellor and the story of the grateful client who named her champion greyhound after her lawyer—much to his embarrassment.

■ Fifty-five years ago, when the University of California made me a bachelor of laws and the California Supreme Court admitted me to practice on the strength of my diploma and without examination, as the bad, but to me convenient, usage then was, the law schools, the law and the lawyers were almost incredibly different from what they are today. The change represents improvement in most respects: perhaps not so in others. It was our good fortune as students in those faraway days to learn something of the common law. Blackstone and Kent were highly recommended for the student's attention; and as far as I am concerned they still are, together with Pollock and Maitland and Holdsworth.

Our law teachers then were not concerned with such subjects as taxes, labor law, utility regulation, blue sky legislation, workmen's compensation or the dozen other curbs on individual freedom and the rights of contract and property which occupy a practicing lawyer today. Taxes were a minor item in the family and business budget. We felt sorry for the unfortunate Europeans who were burdened with taxes and forced into military service to maintain a standing army in times of peace. We could understand how the octroi and forced labor on the roads could stir the towns and the peasantry of France to revolution against a government that took as much as ten or twenty per cent of their earnings, or their time in lieu of earnings. "Special interests" then, as now, had too much influence in political administration, but "special interests" were then "bad" special interests, such as railroads and big corporations, not "good" special interests such as labor unions, the press, the farmers and the school teachers. I am not deploring these changes. I was for years active in bringing some of them about. But with experience came light, and since my crusading youth I have learned that change is not always progress and that when special interests are served the public interest is likely to take a beating.

In law school in the nineties we had courses in what was then supposed to be constitutional law, but we have since come to learn, on more or less respectable authority, that what our professor taught us was mostly wrong: though my honored professor, W. B. Bosley, still alive and flourishing in retirement, insists that he was right then and is now, and everybody is out of step but him and his old professor at Yale, William Graham Sumner, whose *What Social Classes Owe to Each Other* should be compulsory reading for every American citizen.

Oratory Was the Style at the Turn of the Century

In California, as elsewhere, in the early part of the current century, the practice of the law ran much more to oratory than it does now. If you could liven an argument on a demurrer with a few flowers of speech you were esteemed for doing so. But before the twenties the style had changed.

We had then in San Francisco a lawyer of considerable ability named Colonel O'Beirne. Like many lawyers and most orators of any renown, he always wore a frock coat and a tall hat, and when he thrust the forefinger of oratory into the frock coat of statesmanship, to adapt a remark of Ambrose Bierce, the Colonel was something to see and hear. He was somewhat jealous of the rapid rise at

the Bar of a young lawyer named Garret McEnerney, who had won the Pious Fund case, the first case ever submitted to The Hague Tribunal, and years before his death became the acknowledged leader of the California Bar and known to lawyers throughout the nation. I used to enjoy needling O'Beirne because the result was always amusing. One day, meeting him on the street, I remarked on the ability and success of McEnerey. The Colonel replied, "Eustace, my boy, McEnerney may be what nowadays they call a good lawyer, but he is a dull fellow and limited: I never heard him beautify a thought!"

O'Beirne had not observed, and never did find out, that the age of beautifying thoughts as part of the practice of the law was passing out. O'Beirne was an orator even in ordinary conversation as long as he lived. On one occasion, at a large reception where the Colonel and I were present, a public official named Maguire, whose wife was ten years older than her husband and very sensitive about it, introduced her to O'Beirne by saying, "Mamma, I'd like you to meet the famous Colonel O'Beirne." In his most florid manner and with a profound obeisance (the curt nod of modern bad manners had not yet come in) the Colonel said (paraphrasing Horace): "I am proud to meet the remarkably fine mother of a remarkably fine son!" She bridled and replied: "I'm not his mother. I'm his wife!" Instantly turning to me with a sweeping gesture and without dropping from the oratorical level, the Colonel said, "Eustace, let me embellish my previous remark by adding this thought: 'Damn every man that calls his wife "mamma"'."

There is little use for colorful lawyers in civil practice today, but they are the ones who live in memory and anecdote. Some years ago I encouraged a young man of good mentality and rather vivid personality to enter the Harvard Law School. He was flunked out at the end of his first year, and I asked him why that had happened. He answered: "Mr. Cullinan, Harvard Law School is no place for a colorful guy like me!" He was right; so he turned to journalism and became nationally known as an authority on baseball and a sports writer, and has done better than he ever would have done at the law.

While Garret McEnerney was not addicted to beautifying thought in legal argument, he was an interesting and powerful personality who seemed to dominate always in court or conference. It was my good fortune to be associated with him in a number of matters and to enjoy his friendship. In one litigation in California, we were together with the Cravath firm of New York and, though some of his partners were the active participants in the California phase, Paul Cravath came to the Coast on one occasion and arranged for a conference in McEnerney's office which I attended. I was curious to see whether McEnerney's personality would dominate there in the presence of Paul Cravath, who, as many are aware, was himself no shrinking introvert; but, sensing each other's strength, each deferred to the other and I could make no decision.

Cravath and McEnerney respected and liked each other from that day and I think that Cravath liked me, for later he had McEnerney and me for dinner in his hotel suite and three or four years afterward, when my youngest son, Gerald, was visiting a fellow Oxonian undergraduate at his family's home on Long Island, which adjoined Cravath's estate, Mr. Cravath, having met Gerald through the neighbors' introduction, was most kind to him and delighted Gerald by giving a complimentary account of his father, no doubt colored a bit by politeness and hospitality.

Another word or two about McEnerney: A bank which I represented authorized me to associate McEnerney in a mandamus proceeding to be brought directly in the California Supreme Court to compel the State Superintendent of Banks to abrogate a rule made by him, and which we charged to be an abuse of his discretion, confining issuance of permits for branches within certain areas defined by him. This was a matter of much concern to the bank; but I was instructed to be sure to have McEnerney agree upon a fee in advance. We then supposed that only questions of law would be involved. McEnerney suggested $25,000, and the bank agreed. The opposition, however, raised issues of fact.

The court appointed its clerk as referee and we spent most of a year, off and on, in taking depositions. Eventually the court decided against us, but by then the case had become moot, so far as the bank was concerned, because a new superintendent of banks had come in and revoked the rule.

When the litigation ended, I said to the president of the bank that the case had involved much more work than McEnerney had foreseen when he fixed the $25,000 fee and I suggested that we ask McEnerney to revise the fee upward. I was accordingly authorized to offer McEnerney as much more as he deemed proper. When I put the suggestion up to McEnerney he refused to accept anything above the stipulated amount, saying that if the case had taken only half an hour he would have expected the $25,000, and when he made such a contract he expected himself as well as his client to abide by it. And when he sent his bill for the $25,000 to the bank it was accompanied by a note to the president saying in effect, "Dear Jim: Herewith the bill for my stipulated fee. Doubtless you will think the case could have been lost for less."

Once, meeting McEnerney in a book shop, he pulled down a volume from a shelf and presented it to me, saying: "Read this and learn that a lawyer's fame is brief." It was the biography of Lord Russell of Killowen, Lord Chief Justice of England, by Barry O'Brien.

McEnerney was engaged in many important cases and charged large fees (his estate when he died a few years ago was appraised at many millions), but, though he never had a large office or a large staff, his staff, clerical and legal, though small, was of first quality. "I never wanted to operate a law emporium", he said to

me one day, like two or three firms that he mentioned. "Clients come to me for my personal attention and service. I handle every case myself, except for minor details, and I never have very many cases in the office at the same time." That remark points to another change that has come over the practice of the law in my time.

The "Law Emporium" Is the Natural Product of Change

The "law emporium", as McEnerney styled it, has been a natural product of the changes in the law itself. Like medicine, the law has become a profession of specialists. The federal and the state governments have intruded deeply into the affairs of the individual, the corporation and of all businesses. Every will a lawyer draws, every contract, every business transaction on which he advises a client, calls for consideration of possible tax consequences; and the industrialist, the manufacturer or the merchant, wholesale or retail, must watch his step at every turn lest he get caught in an antitrust trap or run counter to some law affecting employment, financing of business, issuance of securities, or regulating our activities and mode of life in some of the many devices by which bureaucracy takes our time, our earnings, and canalizes our freedom of action.

Even our law libraries reflect this revolution. In research we turn less and less to law books and more and more to loose leaf "services" dealing with specialties such as taxes, labor, trade controls and other fields in which changeable regulations having the force of law, devised by unknown busybodies hidden in the penetralia of departments, have taken the place of statutes enacted by legislative bodies. Textbooks are out of date before they leave the printing press.

But, as I see the profession, the law emporium has internal faults. It serves its clients well, no doubt, but interior competition among partners and staff is cruelly competitive with a resultant strain, mental and physical, on overworked juniors which is bad for them and not good for the profession.

There is an active resurgence in favor of states' rights, but it comes too late to do much except embalm the corpse. The commerce clause, and later the welfare clause of the Federal Constitution, as abused by Congress and construed by the Supreme Court, have been the undoing of states' rights. I do not say that this is wholly good or wholly bad. Perhaps much of the change was necessary, though I personally deplore the necessity. Modern means of transportation and communication, the congestion of populations, national advertising and the fact that business, big or small, is no longer confined within state or even regional limits, have made federal intrusion into the field of states' rights inevitable and widespread. But any lawyer or statesman who undertakes the restoration of states' rights had better read these decisions to see how deeply the nation has invaded the states.[1]

Not many years ago I met on the street a boyhood friend, Judge Isador Harris. In the years he has changed a good deal, as doubtless I have myself. He stopped and said; "Eustace, what has become of all the funny old characters that used to practice law when you and I were young?" I said: "Judge, don't you realize that perhaps the young fellows of the Bar today think that you and I are funny old characters?" He said: "That never occured to me." I trust that I need not add that I had to drag myself into that remark out of politeness to the Judge.

I have been writing about California lawyers and California courts because most of my experience has lain there, but it has fallen in my way to have had litigation in Austria and Germany and to observe English courts in action. Some years ago, around 1936, I dropped into Old Bailey one day. There on the stand was an inspector of Scotland Yard and in a few minutes I picked up what the case was about.

It seems that three men in an automobile had driven up to a jeweler's shop; two of them jumped out while

Eustace Cullinan

the third was at the wheel with the engine running. The two smashed the plate glass windows, grabbed 2000 pounds worth of gems and made off. There was a hue and cry, for this was in a public street in broad daylight. But after turning a few corners the two men who had stolen the gems got away and were not caught. But the police caught the driver. They had him dead to rights, of course, but his barrister, a young fellow, was doing exactly what I have seen done in our California courts. Having no defense, he was insinuating by his questions, addressed to the inspector of Scotland Yard, that the stupid police, unable to catch the real culprits, were mak-

1. *Cons. Edison Co. v. N.L.R.B.*, 305 U. S. 197 (1938); *Cleveland v. U. S.*, 323 U. S. 329; *Graves v. People of New York*, 306 U. S. 466, at 489; *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Helvering v. Davis*, 301 U. S. 619-672; *Holmgren v. U. S.*, 217 U. S. 509 (1910); *Kirschbaum v. Walling*, 316 U. S. 517 (June 1, 1942); *Levin v. U. S.*, 128 Fed. 826, at 830 (1904); *Lottery Case*, 188 U. S. 321; *Mulford v. Smith*, 307 U. S. 38 (1939); *Mabee v. White Plains Publishing Co.*, 327 U. S. 178 (1946); *McCulloch v. Maryland*, 4 Wheat. 316 (1918); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Oklahoma v. Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *Robertson v. Baldwin*, 165 U. S. 275, at 279 (1896); *State of Indiana v. Killigrew*, 117 F. at 863 (1941); *Testa v. Katt*, 330 U. S. 386; *United States v. South-Eastern Underwriters Association*, 322 U. S. 533 (1940); *United States v. Darby*, 312 U. S. 100 (1941); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 658; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942); *United States v. Butler*, 297 U. S. 1 (1936); *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377 (1940); *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88 (1942); *Wickard v. Filburn*, 317 U. S. 111 (1942).

ing a scapegoat of this innocent boy who didn't know what was going on.

The judge was very testy, very dogmatic and, as English judges do, was interrupting and expressing opinions much more than is common in our courts.

Finally turning on this young barrister, the judge said: "That is enough of that line of questioning, counsel. It has no probative value, and you know it as well as I do."

The young barrister rose and said: "Your Lordship, I don't know that; I couldn't know that or anything else as well as Your Lordship knows it." A neat and respectful retort. The judge glared, but what else could he do?

On the subject of English lawyers: In 1947 the State Bar of California had its annual convention at Santa Cruz, and the main speaker was Lord Jowitt, then the Lord Chancellor of Great Britain. Farnham Griffiths, who was one of the early Rhodes scholars, was told to see that both Lord and Lady Jowitt were well entertained. Farnham asked me to help out. They were charming persons. We discovered they were no more averse to a drink of Scotch, or even two drinks, than we were.

The (Brief) Case of English Reserve

The local Bar was giving a picnic in a grove of giant redwoods for all those in attendance at the State Bar meeting, and I found out that there was nothing potable to be served out there but beer. I knew the Lord Chancellor and his Lady would not take beer except *in extremis,* so I put a bottle of good Scotch whisky in a brief case and brought it along. We sat at the end of a long table. I produced the bottle of Scotch and there was great acclaim from the Lord Chancellor and also from Lady Jowitt. I thought the bottle of Scotch would be enough for my wife and myself, the Griffiths, the Lord Chancellor and Lady Jowitt, but so many people came around, and we were so hospitable, that before the affair was half over the bottle was empty.

I deplored the fact that we had run out of Scotch and Lady Jowitt then said: "You know, we English have been taught through years of bitter experience that we must always hold something in reserve."

Thereupon she put her hand in her bag and pulled out another bottle of Scotch and saved the day.

Two days later I received from the Lord Chancellor a photograph of him in his wig and the Lord Chancellor's very gorgeous raiment. The picture, which I have in my office, was inscribed: "To my friend Eustace Cullinan, with all my thanks." And it was signed "Jowitt".

Very few people know for what noble deed he thanked me. Probably he, too, has forgotten.

About my Austrian and German experience: Much of it was very interesting, but I have space to tell only one little incident.

I went over there after the earthquake and fire of 1906 to sue two insurance companies, both of which were very rich and solvent, but they had welshed on their policies covering property in San Francisco. Their policies had no escape clauses applying to calamity. These companies just moved out and, incidentally, never have come back. I went over to sue them, representing a large number and amount of claims. Incidentally, I traveled all over Europe without a passport and no governments fell: another respect in which times have changed.

In Vienna I engaged a lawyer named De Griez. He was one of the principal lawyers there. That was the old beautiful Vienna of 1906. De Griez was born in Belgium, was a naturalized Austrian subject, was married to an Irish girl, and had studied law in the Middle Temple in London. He was counselor for the British embassy and the American embassy.

He handled my suits in Austria very successfully, so that had we not settled for 98 cents on the dollar we would have recovered judgments for the full amount plus 10 per cent for counsel fees, as I did in Hamburg. I found, by the way, that litigation is just as slow there as it is here. Anyway, De Griez and I kept up a correspondence for two or three years, until it petered out as most correspondences do. Then came World War I, and I often wondered what had happened to De Griez. Of course, there was no means of communicating. Afterward the awful depreciation of the Austrian currency occurred. Everybody in Austria was broke.

One day I got in the mail a letter from De Griez (I quote from memory): "My dear Cullinan: I have fallen upon very arduous times." He said that his practice had gone to pieces, that there was little or no business there at all. But he said: "When I was a student in the Middle Temple, and in those days I was affluent, there was another student there named Warner Temple, who borrowed some money from me and did what was a custom in England, he insured his life in my favor for 600 pounds. I always paid the premiums. I have been making enquiries and I find Warner Temple went to San Francisco. Would you ascertain whether he is there or whether he is alive or dead?"

Well, I had known Warner Temple. He was an odd Englishman, always wore a short coat and top hat, and in a small way he practiced law in San Francisco. I checked and found he had died about six months before the receipt of this letter. I obtained a death certificate and had it certified by the Czechoslovakian Consul, who represented Austria, and by the British Consul.

A couple of months later came a letter from De Griez saying:; "You have saved me. I have received 600 pounds in English gold, and that means affluence in Austria today."

I have never heard of De Griez since, and I suppose he has passed from the scene.

A Lawyer Hounded by a Dog's Life

All of us enjoy having grateful clients. Sometimes we think our clients

(Continued on page 80)

The Five Functions of the Lawyer:

Service to Clients and the Public

by Arthur T. Vanderbilt • Chief Justice of New Jersey

▪ Speaking to the delegates to the meeting of the American Law Student Association, held in connection with the Annual Meeting of the American Bar Association last August, Chief Justice Vanderbilt outlined the five essential functions of the great lawyer: counseling, advocacy, improving his profession (including the courts and the law itself), leadership in molding public opinion, and the unselfish holding of public office. In urging the future lawyers not to neglect the three latter functions in their pursuit of the first two for their clients, Chief Justice Vanderbilt also made some observations on practical means of achieving judicial reform.

▪ Many lawyers fail to attain full growth. Indeed, many of them never glimpse the vision either of what is rightly expected of the legal profession or of them individually. For them, alas, their responsibilities begin and end with serving their clients and for them the law is only a set of mechanical rules which they attempt to manipulate for the interests of their clients. A lawyer with such an outlook on his profession is not likely either to attract clients or to serve them well, nor will he ever enjoy the solid and durable satisfactions that come from a well-rounded, complete life in the law.

What, then, are the functions of a great lawyer?

1. First of all, a truly great lawyer is a wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice. Effective counseling necessarily involves a thoroughgoing knowledge of the principles of the law not merely as they appear in the books but as they actually operate in action. In equal measure counseling calls for a wide and deep knowledge of human nature and of modern society. Most difficult of all, truly great counseling calls for an ability to forecast the trends of the law.

Very often what the client really wants to know is not what the law is today but what it will be at the time the problem under discussion is likely to come up for adjudication in the courts. This is what Mr. Justice Holmes had in mind when he said, "Prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." This may not have seemed pretentious to Holmes, but what profession demands greater skill in meeting its obvious requirements?

2. Next the great lawyer is a skilled advocate, trained in the art of prosecuting and defending the legal rights of men both in the trial courts and on appeal. Unless a lawyer has had experience as an advocate, it is difficult to see how he can be a thoroughly competent counselor, for he will not be able to evaluate his client's cause in terms of the realities of the courtroom. It is in the courtroom that the law is applied to concrete facts in specific cases, and it is the advocates who, with the judges, in the last analysis set the course of the law.

Advocacy is the most intensive work a lawyer is called on to do. It was not until I was 50 that I began to understand that the decision in every great case is likely to be written with the lifeblood of some lawyer. Advocacy is not a gift of the gods. In its trial as well as in its appellate aspects it involves several distinct arts, each of which must be studied and mastered. No law school in the country, so far as I know, pays much attention to them. Indeed, it seems to be blithely assumed with disastrous results that every student coming to law school is a born Webster or Choate. Clearly somewhere in the course of his professional training our complete lawyer must learn the arts of advocacy.

3. The third task of the great lawyer is to do his part individually and as a member of the organized Bar to improve his profession, the courts, and the law. As President Theodore Roosevelt aptly put it, "Every man owes some of his time to the upbuilding of the profession to which he belongs." Indeed, this obligation is one of the great things which distin-

guishes a profession from a business. The soundness and the necessity of President Roosevelt's admonition insofar as it relates to the legal profession cannot be doubted. The advances in natural science and technology are so startling and the velocity of change in business and in social life is so great that the law along with the other social sciences, and even human life itself, is in grave danger of being extinguished by new gods of its own invention if it does not awake from its lethargy. A few law professors have pondered long and hard on these problems, but the law schools by and large have done nothing about the matter beyond an occasional unpopular and generally ineffective course in legal ethics.

4. In a free society every lawyer has a fourth responsibility, that of acting as an intelligent, unselfish leader of public opinion—I accent the qualities "intelligent" and "unselfish"—within his own particular sphere of influence. In our complicated age sound public opinion is more indispensable than it ever was; without it even courageous leadership may fail. Did not President Franklin D. Roosevelt warn us as early as October, 1937, over four years before Pearl Harbor, in his quarantine speech in Chicago, of the dangers ahead? And did not the newspapers of both parties throughout the country condemn his speech as warmongering? And did not Charles Lindbergh in February, 1939, over six months before the outbreak of World War II in Europe, warn the English that he had actually seen 30,000 warplanes in Germany? And did not the English practically drive him from the country for telling them, for merely telling them, a fact that was of supreme importance to their individual welfare and to their survival as a nation?

How different might history have been and our life today, if only one American lawyer in each city had written a letter to his paper or made a speech supporting the President or if an English barrister in each community in his country had reminded his contemporaries that Lindbergh was undoubtedly an expert on airplanes and that he could certainly count to 30,000? No individual class in our society is better able to render real service in the molding of public opinion.

5. Finally, every great lawyer must be prepared, not necessarily to seek public office, but to answer the call for public service when it comes. The attorney whose professional thoughts begin and end with his own private clients is a pitiable mockery of what a great lawyer really is. Training for public service is a lifelong career. There is no sadder sight in the legal profession than that of a lawyer who has long dreamed of unselfish public service but who has been so engrossed in serving private clients that when the call does come to him for a public career he has so lost contact with the spirit and problems of the day that his efforts in the public interest prove abortive. What should have been a crown of laurel frequently turns out to be one of thorns.

These five—counseling, advocacy, improving his profession, the courts and the law, leadership in molding public opinion and the unselfish holding of public office—are the essential functions of the great lawyer. Education in these five functions of the lawyer is partly the province of the college, partly the duty of the law school, but in large measure it is the responsibility of the individual lawyer not only while in law school but throughout his working years. This is practicing law in the grand manner—the only way it is worth practicing.

Are the Law Schools Preparing Men for the Profession?

These are days of great debate concerning whether the law schools are doing their part in preparing their students for the profession. Chiefly the debate rages around whether the law schools should teach not merely "the what" and "the why", but also "the how" of the law just as the medical schools teach "the how" of medicine and surgery. I must not engage in that debate, but I do venture to say that the law schools generally are not doing what they should be doing to prepare their students for the third function of the lawyer—improving his profession, the courts, and the law.

I shall limit my remarks to a single phase of this responsibility—improving the work of the courts. Is it not the responsibility of the law schools to teach procedure with due regard to the realities of the law? When I was a law student, the teaching of the procedural law was limited to common law pleading and evidence. All I can remember from our study of demurrers, traverses, pleas in confession and avoidance, novel assignment and departure (the chief topics we studied) is that it was demurrable to plead that one threw a stone gently, but that it was not demurrable to plead that the events alleged occurred on the Island of Minorca, to wit, at London, in the parish of St. Mary le Bow in the ward of Cheap, provided one did it under a *videlicet!* All of this seemed to me then and, after thirty-four years of practice largely in the courts followed by some years on the Bench, still seems to me an utterly inadequate preparation for understanding what is going on in the courts today. The course in evidence was devoted to telling us how to keep evidence out of the case, but what I needed when I first went to court was someone to tell me how to get it in!

What the law student most needs in these days when the courts are so much under attack is to be told quite frankly, first, of these shortcomings and, second, of his responsibility for correcting these shortcomings. The picture has never been painted so well as by Dean Pound in his memorable address at the American Bar Association meeting in St. Paul in 1906, concerning "The Causes of Popular Dissatisfaction with the Administration of Justice".[1] You should first read Dean Wigmore's moving introduction to this speech, written thirty years after-

1. 29 A.B.A. Rep. 395-417 (Part 1, 1906).

ward, to get its full significance.[2] If I had my way, I would make it prescribed reading once a year for every judge, practicing lawyer and law professor and law student on the day he returns from his summer vacation and starts a new year of professional activity.

It should be added that since 1906 the American Bar Association has made honorable amends for its reception of Dean Pound's speech by furnishing the leadership that has brought about the drafting and promulgation of the Canons of Professional and Judicial Ethics. It has led the fight against Theodore Roosevelt's campaign for the recall of judges and of judicial decisions, raised the standards of legal education throughout the country, agitated for years for the Federal Rules of Civil Procedure, opposed President Franklin D. Roosevelt's proposal for packing the United States Supreme Court, aided in the establishment of the Administrative Office of the United States Courts and in the movement for the promulgation of the Federal Rules of Criminal Procedure, and brought about the passage of the Federal Administrative Procedure Act.

What can the lawyer, what can the law school student do about improving the administration of justice? Well, the first and greatest complaint against the courts is what is known, euphemistically, as the law's delays. I say "euphemistically", because the "law's delays" is the polite phrase for the delays of judges and lawyers. While I am going to speak principally about the delays of judges, let me say that it is the delays of lawyers that are largely responsible for delays of judges.

The Three Kinds of Legal Delay

Now, what can we do about the delays of the law? Well, those delays are of three kinds. The most irritating delay of all to the lawyer and the layman alike is the delay of the judge in getting on the bench on time in the morning. The jurors have to be there, the lawyers have to be there, and so do the litigants, the witnesses, and the newspaper reporters—everybody except the judge. I am speaking only of my own state in the old days, and there are some New Jersey lawyers here who know I am not exaggerating. You could hear peals of laughter emanating from the judge's chambers, and when His Honor emerged about half an hour later, he would very seriously tell us he had been detained by important work in chambers. But you knew, despite his solemn assurance, that he had been listening to some storyteller recounting the jokes he would tell in his next speech.

How did we in New Jersey get away from that sort of delay? Our Supreme Court used to start at ten-thirty, so we concluded that if we set an example by starting at ten o'clock at the state capitol, there would be no reason why every trial judge should not get on the bench by ten o'clock in his county. In short, a good example overcame that kind of delay.

The second kind of unnecessary delay is in getting cases on to trial after the pleadings and the necessary preliminaries in preparation for the trial are complete. Almost everywhere you will hear the cry, "But we need more judges." Well, that may be true now and then, but I think in most states you will find that there are enough judges if the chief justice is authorized to shift the trial judges from court to court as needed. There are always counties where there is not as much business as in other counties; there are always courts in the larger counties that are not as busy as some other courts in these counties.

Accordingly, the first thing you need to do to overcome delay in getting cases on to trial is to give the chief justice or a presiding judge the power to assign the judges where they are needed, and to the kind of work, moreover, that they are best fitted to do. Of course, there is nothing more detrimental to good judicial work than assigning a judge who is good with a jury—whether in civil or criminal work—to equity work

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that he doesn't enjoy, and vice versa.

The second result from the power to assign judges is that—and this is something you will have to take on faith because it doesn't sound possible until you see it tried—if you have Judge *A* sitting in Courthouse *A* and Judge *B* sitting in Courthouse *B*, each operating from a separate list of cases, they will try a certain number of cases. Yet if you put Judge *A* and Judge *B* in the same courthouse and let them operate from a common list, they will try half again as many cases as they did sitting alone in different courthouses. You can continue the process up to the limit of trial judges available, the number of courtrooms available, and the number of trial lawyers available. There is something about having a lot of judges working together on an active integrated list that makes for the rapid disposition of cases. Don't ask me why it is so for I don't know, but I do know that it is so. It works that way.

But the right to assign judges alone will not clear up court congestion. To that you must add pretrial conferences.

The pretrial conference is an institution that is probably more misunderstood than anything else in our procedural law. In its fully de-

2. 20 *J. Am. Jud. Soc.* 176 (1937); both Dean Pound's address and Dean Wigmore's Introduction are reprinted in Vanderbilt, *Cases and Other Materials on Modern Procedure and Judicial Administration*, 28-49 (1952).

veloped sense it means that after the lawyers on each side of a case have consulted with each other about the issues of law and fact in the case, they come before the judge in open court. The judge, having looked over the pleadings and listened to each side's outline of its case, proceeds to state the issues, shaking out of the case any nonessentials in the pleadings. He then proceeds to discuss with the attorneys what proofs may be stipulated. He asks, "What documents are you going to introduce in evidence?" Ordinarily there is no dispute about such documents; accordingly they are produced and given a number in evidence, so that they will be ready for presentation at the trial without calling the attesting witnesses. In automobile negligence cases, the ownership of the car and the agency of the driver are generally stipulated and likewise the damages to the car, when the main issue is liability for damages to the person of the plaintiff.

This process of consultation results in a pretrial order which defines the issue, provides for any necessary amendments to the pleadings and states the admissions of each side. It is dictated in open court and signed by the judge and the lawyers. The remarkable thing about it all is that at the end of a pretrial conference very often the plaintiff's lawyer for the first time really understands the plaintiff's case. This statement is not meant to be humorous because the case may not have been prepared by the plaintiff's lawyer at all but by some bright young man in his office. It is highly desirable, you see, that the plaintiff's lawyer should know his case before he attempts to try it, and that is one of the good results of a pretrial conference. For the first time, too, he gets a proper perspective on the defendant's case.

Pretrial Conference Leads to Settlements

Likewise the defendant's lawyer for the first time gets a true concept of his own and his adversary's case. Suddenly it dawns on each of them that instead of this being a case that the plaintiff can't lose or the defendant can't lose, it begins to be one that has a monetary value in terms of a settlement. But that is not the most important result of a pretrial conference, for month in and month out, in every county in our state—metropolitan, suburban and rural—three quarters of the cases are settled between the date of the pretrial conference and the date when the case goes to trial two weeks later without the judge saying a word about settlement.

But settlements are not the most important thing about pretrial conferences, nor the fact that they shorten the trial of cases from a third to a half. The great, important thing about pretrial conferences is that the judge knows what the case is about from the beginning. If it involves some proposition of law that he is not familiar with, he can order briefs in advance, so that before the trial starts he will know as much about the law of the case as the lawyers do. That, as you see, also helps the lawyers because otherwise they would not prepare their briefs until some later date, hoping to avoid their preparation. Thus the assignment of judges where needed and the holding of pretrial conferences are simple ways of avoiding delay in getting cases on to trial.

The third great cause of the law's delay comes after the case is tried and the judge says the fatal words, "I will take the matter under advisement." I have waited in the old days two years, four years, six years, eight years, ten years for decisions in our Court of Chancery. We have had a lot of Lord Eldons in New Jersey. They were aided and abetted by many a prospective Lord Eldon at the Bar, who would wait until the end of the case, and then would say, "Your Honor realizes now that this is a complicated case, and I would like to submit a brief to help Your Honor. I would like a month's time." The defendant would want a month for an answering brief, and the plaintiff at least two weeks for a reply brief—two and a half months in all. The judge would push the case aside, and all of it would disappear from his mind as he went on to the trial of other cases.

I submit that a trial judge will never know as much about the case he is trying as he does after he has read the trial briefs, after he has heard the evidence and after he has listened to the argument of counsel. Then, if ever, the moment of decision has arrived. If he lets it go until the next day, he is going to start off on a new case, and then another case and then still another case, and each case he tries will render the facts of the indicated case still dimmer in his mind.

Thus, in my state we have a rule that the lawyers must file their briefs in advance. If the judge doesn't decide the case within twenty days after oral argument, he must indicate the reason on his weekly report. And here is a strange bit of judicial psychology—even the hardest pressed judge would rather write out an opinion than to write down in his report some reason why he hasn't decided the case. Thus, almost all cases are decided promptly and the law's unnecessary delays, as we have seen, are easily avoided.

Rules of Procedure Should Be Court-Made

Next to the law's delays, nothing irritates the public as much as decisions based on technicalities of procedure and pleading. How can we prevent such decisions which fail to dispose of the controversy on its merits? Well, the easiest way to eliminate them is to allow your court of last resort to make the rules of procedure rather than to have a legislative code. If there is a code, the judges feel that they are bound to follow the code literally and exactly.

If there are judicial rules of procedure instead of a code, they are not only likely to be better designed for litigation, but they are made by judges and they will be interpreted by judges. They always contain, or at least should always contain, a provision that the purpose of the rules is the advancement of justice and

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The Reed-Dirksen Amendment:

A Reply to Professor Cary

by **Robert B. Dresser** • of the Rhode Island Bar (Providence)

■ The proposal to amend the Constitution to limit the power of Congress to tax incomes, estates and gifts has been the subject of several articles in the *Journal* since the House of Delegates voted to endorse the proposal at the 1952 Mid-Year Meeting. This is Mr. Dresser's reply to an article published in the October issue of the *Journal* which was itself a reply to two earlier articles by Mr. Dresser.

■ Professor William L. Cary, of Northwestern University Law School, in an article published in the October issue of the AMERICAN BAR ASSOCIATION JOURNAL, severely criticizes the proposal to limit the taxing power of Congress by constitutional amendment and the arguments which I have advanced in support of it, and accuses me of "inconsistency and confusion".

At the outset it should be made clear that there are three different amendments proposing a limitation on the power of Congress to tax incomes, estates and gifts. Failure to realize this leads to utter confusion in any discussion of the subject. This apparently is largely responsible for Professor Cary's confusion.

First, there is the amendment sought by the state legislatures which limits the power of Congress to impose income, death and gift taxes to a maximum rate of 25 per cent, with no right to suspend the limitation except in time of war.

Secondly, there is the First Reed-Dirksen Amendment introduced by Representative Chauncey W. Reed and Senator Dirksen in the House and Senate in the fall of 1951. This amendment deprived Congress of the power to impose death and gift taxes at any time, and limited the power of Congress to impose income taxes to a maximum rate of 25 per cent, with power, however, by a vote of three fourths of the members of each House, to raise the rate to 40 per cent each year, even in peace time, and with the further power by a like vote to suspend the limitation on income taxes completely during a major war.

Thirdly, there is the Second Reed-Dirksen Amendment introduced by Messrs. Reed and Dirksen in January, 1953, in substitution for their first amendment. This amendment limits income taxes to a maximum rate of 25 per cent, but permits Congress by a vote of three fourths of the members of each House to exceed that rate without limit. When the top rate exceeds 25 per cent, however, it can be no more than 15 percentage points above the bottom rate. For example, if the bottom rate were 15 per cent the top rate could not exceed 30 per cent. If the bottom rate were 20 per cent the top rate could not exceed 35 per cent. If the top rate does not exceed 25 per cent, however, there is no restriction at all on the bottom rate. It could, for example, be 1 per cent or one-half of 1 per cent.

This would make it in the interest of *every* taxpayer (1) to keep the top rate down to 25 per cent (as compared with the present rate of 92 per cent) and (2) to keep the bottom rate no higher than 10 per cent (as compared with the present rate of 22.2 per cent).

It should eventually be possible to get the bottom rate down to much less than 10 per cent.

The proposed amendment is just as important for the small taxpayer as it is for the large.

This united self-interest of all taxpayers is relied on as a force that would keep the tax rates within reasonable bounds. There are 66 million individual income taxpayers in the United States. Their voting power is decisive.

It should be noted that the proposed amendment *merely limits the degree* of tax rate progression. It does not prescribe the top rate that Congress may impose. Hence, it cannot be argued that the Amendment im-

pairs the Government's power to raise needed revenue either during war or peace.

Death and Gift Taxes Would Be Left to the States

The proposed Amendment also deprives Congress of the power to impose death and gift taxes, and leaves these means of raising revenue exclusively to the states where they belong, and where competition among the states would tend to keep the rates within reasonable bounds.

Even with the very high rates now in force, the revenue from these taxes is comparatively trivial. The revenue collected from them in 1952 was $751 million from the estate tax, and $83 million from the gift tax. This is a little over 1 per cent of the total budget—enough to pay the Government's expenses for between three and four days.

The gift tax is merely auxiliary to the estate tax, and both should be dealt with alike.

Dean's Griswold's Article Dealt with the State Amendment

In his article in the *Atlantic Monthly* for August, 1952, to which I wrote a reply that was published in the January, 1953, issue of the JOURNAL, Dean Griswold dealt with the state amendment, the first of the three amendments above described. As a result his figures and much of his argument were, as I pointed out in my reply, wholly inapplicable to the First Reed-Dirksen Amendment which had been introduced in Congress the previous fall. Obviously, they are inapplicable to an even greater degree to the Second Reed-Dirksen Amendment, which had not been introduced in Congress at the time Dean Griswold's article was written.

In my second article published in the JOURNAL's issue of March, 1953, I discussed briefly the provisions of the Second Reed-Dirksen Amendment, which had been introduced after my first article had been written.

Professor Cary has completely confused the issue by using figures and arguments largely applicable either to the State Amendment or to the First Reed-Dirksen Amendment, but wholly inapplicable to the Second Reed-Dirksen Amendment.

Are Tax Rates an Appropriate Subject for Constitutional Amendment?

As his *first* point, Professor Cary raises "the basic question whether tax rates are an appropriate subject for constitutional amendment". I have dealt with this question in my first article published in the JOURNAL for January, 1953. The answer depends on whether one believes in a government of limited powers or one of unlimited powers. Unlimited power to tax will eventually destroy all other limits and establish a government of unlimited powers. This was fully recognized by the framers of the Constitution who imposed curbs on the power to tax incomes which were unfortunately *completely* removed by the Sixteenth Amendment. Congress should no more have unlimited power over one's property than over his person; for, in the oft-quoted language of Chief Justice Marshall, "the power to tax involves the power to destroy". To one who believes that Congress can be relied upon to exercise the taxing power wisely and to keep the rates within reasonable bounds, I refer him to our experience of the past twenty years.

Effect of the Amendment on the Government's Revenue

Professor Cary's *second* point is that my position "appears to rest upon the premise that taxes should be reduced immediately—irrespective of whether the budget is in balance", and that "in the amendment there is no express provision postponing its effective date".

Of course I regard balancing the budget to be of fundamental importance. Professor Cary's assertion, however, ignores completely the fact that it will take a period of years to secure the adoption of the Amendment. Furthermore, it ignores the fact that the amount of revenue involved in the elimination of the communistic or socialistic features of our tax system is relatively small and can, if necessary to balance the budget, readily be made up by other forms of taxation or a reduction of expenditures.

The Second Reed-Dirksen Amendment does not limit the amount of revenue Congress may raise, but merely eliminates in large measure from our system of taxation its communistic or socialistic features, namely (1) the "*heavy* progressive" income tax, and (2) the confiscatory death tax, which will eventually dry up the sources of private capital and force us into Socialism. The *immediate* loss of revenue from these two changes would be (1) about $2 billion from the individual income tax with the present beginning rate of 22.2 per cent and a top rate of 37.2 per cent (15 percentage points higher), and (2) about $800 million from the estate and gift taxes, a total of less than $3 billion. This is about 4 per cent of the total revenue of $68 billion—enough to pay the Government's expenses for about two weeks. By way of illustration, (1) it is equal to the revenue from a tax of about 7 per cent on the income of corporations; (2) it is equal to the revenue from a manufacturers' excise tax of 2½ per cent on all end products of manufacture, except food, food products and liquor and tobacco; and (3) it is equal to the revenue from a retail sales tax of less than 2 per cent.

However, the loss in revenue would undoubtedly be only temporary. Eventually the lower rates would produce greater revenue than the high rates. The reason is this:

The revenue from an income tax is dependent not only on the rate of the tax, but also on the size of the income on which the tax is imposed. Within reasonable limits, low rates will in due course produce greater revenue than high rates. Reason and our own experience demonstrate this. There are two reasons:

(1) The lower rates leave more income in the hands of the taxpayers. This income when invested produces more income, which, in turn, when invested produces still more income, and so on.

(2) The lower rates *encourage*

greater work, greater savings and greater production of wealth.

The result is to increase the national income on which the tax is imposed, so that with lower tax rates greater revenue will be produced. This, in turn, makes possible further reductions in rates. At the same time the increase in the nation's wealth benefits the people as a whole.

Studies made by Dr. Willford I. King, one of the country's leading economists, show that "income tax rates taking more than 26% of the incomes of individuals have succeeded in raising no more revenue than could have been obtained by a 26% rate". What they do is to "destroy the income from which the fiscal authorities have expected to gain revenue".

Professor Cary states that

> At the present time it is generally thought that the current bottom rate of 22 per cent is high in the light of an exemption of only $600 per individual. Many of us in the Association and outside would find $600 per year a rigorous minimum living standard indeed.

I entirely agree with Professor Cary that the bottom bracket rate of 22 (22.2) per cent is high and that the exemption of $600 per individual is low. Let us, however examine the effect on the revenue of a change in these items. For each one percentage point of reduction in the bottom rate the loss in revenue would be about $850 million. A reduction of the bottom bracket rate to 20 per cent would cost the government about $1,870,000,000.

Now let us see what an increase in the present personal exemption and credit for dependents of $600 would cost. It is estimated that an increase of $100.00 in the personal exemption and credit for dependents would result in a decrease of income taxpayers by at least 7 million and a loss of $2.5 billion in revenue. This is within several hundred million dollars of what it would cost to remove the communistic or socialistic features from our system of taxation as above pointed out. From Professor Cary's statement it would appear that he believes that the exemption should be increased much more than $100; for he seems to think that the purpose of the exemption is to provide funds sufficient to pay one's living expenses. What does he think this would do to the budget?

The foregoing figures show that the great bulk of the revenue from the individual income tax comes not from the taxpayers with the large incomes, but from those with the small incomes. This is for the very simple reason that *that is where the great bulk of the income is. The only possible way to give relief to the small taxpayers is either (1) by reducing the need of revenue through cutting expenditures, (2) by increasing revenue through a drastic reduction of the present confiscatory higher bracket rates, or (3) by a combination of the two.*

Does Professor Cary Think Our Present Tax Structure Sound?

At this point I should like to inquire whether Professor Cary thinks our present tax structure is a sound one. Over 80 per cent of the revenue is derived from income taxes on individuals and corporations. Professor Cary will agree, I am sure, that taxes on expenditures, that is, excise or sales taxes, constitute a much more dependable source of revenue than taxes on income; for income goes up and down with the rise and decline of business. The fluctuations in spending are much less pronounced.

In September of this year a very interesting and informative article was written by William R. Biggs, Vice President of The Bank of New York, the oldest banking institution in the country. Pointing out the unstable character of the income tax as a producer of revenue, Mr. Biggs presents figures indicating the probable effect on revenue and employment of a slow-down or recession of the 1949 type, and also of the 1938 type.

His conclusions are that a mild form of recession such as occurred in 1949 would result in a federal deficit of more than $17 billion, and 5 million unemployed, compared with a nominal 1½ million unemployed at the present time.

A recession of the 1938 type would result in a federal deficit of $30 billion and 8½ million unemployed.

I quote from Mr. Biggs' article as follows:

> The second and most outstanding conclusion to be drawn from this study is the vulnerability of the receipts side of the federal budget to a business decline. In the last twelve years the United States has built up a revenue system which depends to the extent of nearly 80% of total receipts on corporate and individual income taxes. No government in the world, to our knowledge, raises such a large proportion of its budget from income taxes (personal and corporate) as the United States. In most countries, including members of the British Commonwealth, the percentage of the budget raised from income taxes (personal and corporate) is nearer 50% than the 80% in the United States. Because of this dependence on income taxes, revenues are especially difficult to predict. . . .
>
> A decline in business and in profits finds the government a deeply involved partner, so that its tax receipts fade very rapidly. . . .
>
> These estimated budget deficits are disturbing as an indication of what may be in store for the United States economy in the event of a decline in business. . . .
>
> If the long-term integrity of the dollar is to be maintained, the present top-heavy dependence for revenue on income taxes must be adjusted. Reform of the revenue system will not be easy politically, since it will involve finding new sources of income such as a national sales tax of some kind.

Professor Cary's observations regarding "the experience of the thirties" shows a complete lack of understanding of the significance of that experience.

I dealt with this subject at some length in my reply to Dean Griswold published in the January, 1953, issue of the JOURNAL and I shall not repeat the arguments here. Suffice it to say that the present apparent prosperity despite high tax rates is the direct result of war and the accompanying inflation, an inflation which during the thirteen years ending with 1952 cut the purchasing power of the dollar almost in two. Certainly we cannot continue to depend on a war induced inflation to maintain "pros-

perity". The ultimate result is bound to be disastrous.

Tax Rate Objectives of the Amendment

Professor Cary complains that the proposed Amendment "contemplates a 25 per cent top ceiling". It is true that that is the ultimate goal, and there is no good reason why it should not ultimately be achieved.

It is equally the goal of the Amendment to get the bottom rate down to 10 per cent and eventually to much less than 10 per cent. This will be possible as soon as we can substantially reduce the expenditures for military purposes.

Professor Cary's statement that "the 25 per cent would necessarily become not only the maximum but also the minimum rate", is of course not the fact.

Likewise, his statement that "It seems imperative to re-emphasize the inflexibility of the Amendment", if intended to apply to the Second Reed-Dirksen Amendment, displays a failure to comprehend its provisions. As I have already stated, this Amendment merely limits the *degree* of tax rate progression. It does not prescribe the top rate that Congress may impose. Hence, it cannot be argued that the Amendment impairs the Government's power to raise needed revenue either during peace or war.

Incidentally it should be observed that the present confiscatory rates are not approved by a large majority of the American people. This is shown by a Gallup Poll published in July, 1952. According to this poll the vote of those having an opinion was almost 3 to 1 in favor of a 25 per cent top limit.

Taxation According to Ability To Pay

Professor Cary's fear that the Amendment would abolish completely "the principle of taxation according to ability to pay . . . as applied to the federal income tax" is merely a repetition of the usual argument in favor of the progressive income tax. As I have already observed, the Amendment does not *prohibit* tax rate progression. It merely limits its degree.

As Congressman Chauncey W. Reed observed in his speech of January 9, 1953:

> Due to the personal exemptions and credits for dependents which have become a well-established feature of our tax laws, the possible degree of progression under the proposed Amendment would be substantially greater than the 15 percentage points spread. For example, under the present law a person with $2400 of such credits and net income of $4000 before deducting the credits would have his tax cut by the credits from $936 to $355.20, thus making the effective rate of tax on his $4000 income about 9 per cent instead of 23.4 per cent. As incomes increase, the effect of these credits on the rates diminishes, thus increasing markedly the real degree of progression in rates between the smaller and larger incomes. It can readily be seen that credits of $2400 would have but little effect on the rate of tax on a $100,000 income.

In his discussion of the tax on corporate income, Professor Cary seems to assume that the rates on corporations and individuals must be the same under the Amendment. This, of course, is not the fact. The Amendment expressly provides that "subject to the foregoing limitations, the rates of tax applicable to the incomes of individuals may be different from the rates applicable to the incomes of corporations, which term shall include also associations, joint stock companies, and insurance companies". The only similarity is that where the corporate rate exceeds 25 per cent the difference between the top rate and the bottom rate cannot exceed 15 percentage points. The spread under the present law is 22 per cent—the difference between 30 per cent on the small corporations and 52 per cent on the larger corporations.

According to Secretary of the Treasury Snyder's report of February 5, 1951, to the Ways and Means Committee, there were about 400,000 taxable corporations, of which 281,200, or 70 per cent, were in the net income class of $25,000 and under, which is taxed at the lower rate of 30 per cent as compared with 52 per cent on corporations with larger incomes.

Also, according to Secretary Snyder's report, the 281,200 corporations with profits of $25,000 and less had only 4.8 per cent of the taxable net income of all corporations and paid only 3 per cent of the total taxes on corporations.

It should be observed that, irrespective of one's views as to graduated rates in the case of individuals, it must be clear that the graduation of rates in the case of corporations is unsound. In essence, a corporation is nothing but the aggregate of its stockholders. It is the stockholders, not the corporation, to whom the profits ultimately belong and upon whom the tax burden in reality falls. The value of the average stockholdings is undoubtedly much less in the case of the large corporations than in most of the smaller ones. In the case of the American Telephone and Telegraph Company, for example, on December 31, 1951, there were over 1,092,000 stockholders, the average number of shares held by each was 26, and one half of the total number held ten shares or less. At the stock's closing price of $153⅝ on October 27, 1953, a holding of ten shares would have a value of about $1539. Accordingly, to tax the large corporation at a higher rate than the small is in effect to tax the small stockholder, the real party in interest, at a higher rate than the large stockholder. It should be remembered that the stockholders of the corporations in the "$25,000 and under" class constitute only a small fraction of the total number.

However, largely for political reasons, there has become imbedded in our tax laws the principle of granting lower rates to the smaller corporations. All that the proposed Amendment does is to provide that this concession shall not exceed 15 percentage points.

In order to comply with the 15 percentage points spread requirement of the Amendment it would be necessary either (1) to increase the 30 per cent rate on the small

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Laws and Lawyers of the Far East:

A Peripatetic Report

by **Robert G. Simmons** • Chief Justice of the Supreme Court of Nebraska

■ This is an account of Chief Justice Simmons' 1952 visit to six Far Eastern nations. His observations, impressions and conclusions are of especial interest, since the progress of these nations toward democracy is an important factor in the Cold War.

■ In the summer of 1952, I visited with lawyers and judges in the Philippines, Japan, Indonesia, Thailand, Burma and Nationalist China.

We met as lawyers and judges, members of a common profession. We discussed matters concerning the administration of justice, quite often with the confidences that mean so much among ourselves and in our relations with those outside our ranks.

The Philippines

We quite naturally expect to find marked similarities in the constitutions, courts and laws of the Philippines and the United States. For there is a nation of free people guided to that status by the American policy of aiding peoples to establish and maintain their own governments. For fifty years we, as a nation, assisted them as they built for themselves.

Their constitution is largely drafted after our Federal Constitution, with those changes that they evolved to fit their particular needs. Their courts all function as a part of the national system. Judges are appointed and hold office for life. The court organization is generally like that of one of our more populous states.

Likewise the Code of Civil Procedure which the Spanish extended to these islands in 1889 was supplanted by an entirely new code based largely on the Civil Code of California with provisions adopted from other states. They have had the main features of America's reformed procedure since 1900.

The Supreme Court has the rule-making power, and there is legislative power to repeal, alter or supplement those rules promulgated by the court. These rules follow in their principal features those of our courts, including a rule that has the essential elements of pretrial. Their criminal procedure follows in the main that of an American court.

When the Spanish came to the Philippines they found neither a national law nor a national language. There were "codes" of law local in character and restricted in application. The civil code of Spain was extended to the Philippines in 1889 and remained the measure of rights and obligations until there was a general revision of their code in 1947. The code specifically recognizes a number of our equitable actions and contains other quite modern provisions. They have also adopted a number of the uniform acts, modified to fit their needs. Their substantive law is a blend of Spanish and American made to conform to native customs, ideals and needs. Their courts themselves show that blending. Some judges and lawyers use the language of Spain, some English, and an interpreter is always present to translate if need be the language of the litigant into that of the court.

The College of Law of the University of the Philippines, is the only law school outside the Continental United States that is accredited by the American Bar Association. In their catalogue under "system of instruction" I find this quite revealing sentence: "The Anglo-American law is resorted to in case the local law is silent on any given point, and even when the local law has an express provision the common law is frequently studied for purposes of comparison."

Here then in the Philippines is a nation growing in stature and strength, building for themselves a legal system in many respects the same as ours.

Japan

I was in Japan during the closing days of their national election campaign. It was both visible and audible that free speech, a free press and freedom of assembly existed in that nation. Japan has advantages over some of the other nations I visited. Her people and officials have had a longer experience with constitutional government, they have never been an occupied nation for any length of time and the general educational level of her people is higher than in many other eastern lands.

An examination of their 1946 constitution reveals that in the chapter dealing with the "Rights and Duties of the People" there are substantially all of those principles that are in our own Bill of Rights and are scattered elsewhere in our constitutions.

There can be no question of the power of the courts in Japan, for the constitution specifically provides "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

The Supreme Court of Japan is composed of fifteen members. They sit in three divisions. The entire court, however, hears constitutional questions, cases of original jurisdiction and cases that involve the overruling of established precedents. The judges are appointed, yet run against their record for approval of the people, at ten-year intervals.

I visited with their Supreme Court and later with their distinguished Chief Justice and others in his home. They have a problem that is difficult, and yet in itself it tells the reliance that the Japanese people place in their courts. The Supreme Court has a backlog of seven thousand cases! They must consider all appeals. There is no certiorari. They asked what steps an American court takes to get and keep current. They found it difficult to understand my statement that the Supreme Court of Nebraska maintained its work with from sixty to seventy-five cases on its docket. I was able to describe the method by which, in the years that were past, we had worked up from a backlog of over 1000 cases to our present enviable position. Possibly some of you can give them a solution.

Indonesia

Lying astride the equator south and east of the Malay Peninsula toward Australia are some 3,000 islands, populated by 77,000,000 people, which comprise the Republic of Indonesia.

Here are a people of an old civilization, with a distinctive, honorable history. They look not backward but forward. For 350 years they were a colonial possession—the people working, producing, building, not for themselves but for their colonial masters. Only a few were privileged to have an education. Most were kept in ignorance of all matters save the skill of particular jobs. They were denied training in government, self-government included, except as to that which was indigenous to that part of their native law and customs which they were permitted to keep. There were a few, relatively, who were permitted to have an education—and these constitute the intellectual group upon whom suddenly the burden of building a nation of free people was cast when the shooting of World War II came to an end.

They determined to build a nation where sovereignty was in the hands of the people. Although their Declaration of Independence is dated August 17, 1945, their independent status was in fact not recognized until December of 1949.

In 1950, Indonesia adopted a provisional constitution to be effective until such time as the people by the election process could select a representative assembly and adopt a basic instrument of self-government. While it followed generally the parliamentary system of England, their written constitution was modeled after that of the United States, setting up the three departments of government, but adjusting language and provisions to meet their needs.

I do not find in the provisions of the Indonesian constitution, with reference to the judiciary, any clear constitutional declaration assuring its independence as a co-ordinate branch of government.

We of the English jurisdictions know of the common law, its origin, its growth, its changes to fit the needs of developing growing nations. We deem it to be a system peculiarly ours—and it is. But here in this far-away land of Indonesia I found another like system of law. It is known in their language as their *adat* law, or if you please, their "common law", for that expression occurs at least twice in their provisional constitution.

What is the *adat* law? It is that law which has grown up with the people, developed by them by the process of trial and experience. Like the pattern of their beautiful batik garment, the *adat* law is woven through the very fabric of their whole social existence. It is the people's law—a living growing law. It has adjusted itself to the impact of religions; it withstood the effort of colonial powers to supplant it with "Western law"; it persisted in the long years of colonial government, and now, with the freedom of its people, it has come into its own as the basic law, subject of course to change by the processes of self-government.

In a sense it is local law, dealing as it does with ownership of property, inheritance, marriage and family relationships, local government, the rights of women. It varies with localities and naturally formed groups of peoples. The Indonesian statesmen recognize the need of maintaining and strengthening that law and building upon it—and yet they recognize also that there is need for a system of law—nation-wide—in such matters as commercial law and those new fields that a unified nation creates. They now seek to codify their *adat* law, relating to particular areas and people that which is common to them, and adjusting it nationally to national needs. The task is a difficult one but not impossible—it will take time, patience, devotion. They will get the job done.

Thailand

Between Indo-China and Burma along the southeast coast of Asia lies the Land of the Free. Few will recognize it by that name. Most of you will know it as Siam, but if you looked for it by that name on current maps you would not find it. You will find a land, about the size of Texas, known as Thailand. Thailand is the old native name and freely translated it means Land of the Free, and rightly so. For, excepting the period of Japanese occupation, the Thai people have been free for centuries, in the sense that theirs is the only nation in that whole area which has not at sometime been a colonial possession of some Western power. Until 1932 they were ruled by a king with the powers of an absolute potentate, but even so they have had long experience in governing themselves.

Three quarters of a century ago their great King Chulalongkorn turned the course of his nation toward a government of free men. Modernization began—men and women for the first time stood erect in the presence of their king—but it was more than a physical standing erect—the nation began to move forward. In 1932 they became a constitutional monarchy, following the parliamentary system of England, and recognizing and establishing the three departments of government. Like ours, their constitution has its bill of rights of the Thai people beginning with "all persons are equal before the law". Many of the provisions of their constitution can in effect be found in our state and federal constitutions.

Thailand has a judiciary, with a system of courts well organized, with limited, general and appellate jurisdictions. Their judges hold office under civil service and as a part of the Ministry of Justice. Members of their Bar are well trained in two law colleges in their own land and many in the schools of England and Europe and the United States. They administer justice according to law. Their courts have from time to time protected and enforced constitutional rights. They have moved forward.

A juvenile court has been recently established in the City of Bangkok. This has been brought about by the leadership of judges and lawyers who desire to improve the administration of justice in that field. The government has co-operated. That is an old story—and one somewhat common in America. Here is the strikingly unusual feature of the preliminary court study and planning. A young judge was selected to head the court. Thailand sent him to six nations of Europe to study juvenile court systems so that the best from the European systems could be adapted to Thailand. The next year he was sent to the United States to extend that study. May I ask what city or state of America has laid such a foundation before establishing juvenile courts? Has our nation ever done it in extending the federal system? I know of no such action.

Burma

We cross a range of mountains to the west and come to Burma, known to some because of the great golden pagoda at Rangoon, to others because of Kipling's "On the Road to Mandalay" and to others as a part of England's colonial empire.

Here is one of the world's newest nations, built on a proved governmental pattern. It is a constitutional republic with the English parliamentary system and the three well-known co-ordinate departments of government.

Their constitution lists, states and then spells out the "fundamental rights" all suggestive of close study of England's and America's basic laws. There we find a constitutional provision placing in the Supreme Court the power to issue "directions" in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Those are words whose meanings have been known and which have their roots in the struggles of England's people for freedom from arbitrary power. There we have a constitutional provision that "justice . . . shall be administered in courts established by this constitution" and there we find a provision that "no law shall be enacted" excepting from the appellate jurisdiction of the Supreme Court questions as to the validity of any law having regard to the provisions of the constitution.

Robert G. Simmons has been Chief Justice of the Supreme Court of Nebraska since 1938. A native Nebraskan, he served several terms in Congress and was twice nominated for the United States Senate. He has served as Chairman of the Section of Judicial Administration and was a member of the House of Delegates from 1946 to 1948.

For almost a century of English rule the Burmese people had the administration of the law provided for them. By and large, the rank and file of their people had no part in government or its functionings. Advanced education was excellent, but for relatively few of the Burmese, not only in the colleges of Burma but in England and on the continent. Then suddenly, in Burma as in Indonesia, freedom and the responsibility of building and maintaining free government came. Their constitution was adopted in September of 1947 and yet it was not until March of 1952 that they were able to set up their first government responsible to a freely and democratically elected parliament. Despite large scale internal resistance to the government, they are going ahead in the building

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The Disadvantages of Social Security for Lawyers

■ At the recent Annual Meeting in Boston, the Association's Standing Committee on Unemployment Compensation and Social Security recommended that action by the House of Delegates be deferred pending completion of the studies which the Committee had been conducting for several years. In an article appearing in the November issue of this *Journal*, Dean Arthur Larson of the University of Pittsburgh Law School presented arguments favoring including lawyers within the provisions of the Social Security Act. Now the Standing Committee on Unemployment Compensation and Social Security, following its study, presents an outline of its position opposing inclusion of lawyers under the Social Security System.

■ The Standing Committee on Unemployment Compensation and Social Security has unanimously adopted the following positions:

(1) The Committee reaffirms the position taken in its report last year and opposes all proposals which would treat lawyers or any single professional group as a separate and special class for purposes of Social Security coverage.

(2) The Committee reaffirms the position taken by the House of Delegates in 1950 and opposes the inclusion of self-employed lawyers under the present Social Security System. The Committee firmly believes that self-employed lawyers and all self-employed professional persons should be covered by legislation designed to meet their particular circumstances and not be forced under a statute which ignores the economic and social facts of professional life.

The Committee is aware that a number of bar groups favor inclusion of self-employed lawyers under the present Social Security System. The Committee also knows that many other lawyers oppose such inclusion. Because of this diversity of opinion within the Bar, the Committee has given the matter most careful study. Our study leads to the following inevitable conclusions:

(1) There are basic social and economic differences between employed persons and self-employed professionals;

(2) The present Social Security Act was designed solely to meet the needs of employed persons and was never intended by its draftsmen to meet the needs of self-employed professionals; and

(3) Self-employed professionals have specific needs which require specific legislative treatment.

Each of these conclusions is discussed more fully below.

I

There are basic social and economic differences between employed persons and self-employed professionals. The general working pattern of an employed person's life is to work until a fixed retirement age—usually considered to be 65—and then to cease work abruptly and completely. Our present industrial society tends to force employed persons into retirement. Many employers will no longer continue to employ an individual after age 65. The labor market generally places a sharply reduced value upon the services of employed persons after age 65.

The general working pattern of a self-employed professional, such as a lawyer, is quite different. Our industrial society recognizes that professional competence is based in great measure on long years of experience. As a result, although employed persons tend to be forced into complete retirement at age 65, quite the opposite is usually true in the case of professionals. In contrast to the reduced value placed on the labor of employed persons over 65, society places a very substantial value upon the mature wisdom of the "elder statesman" professional. Thus, for example, it is not uncommon to find a corporation which would not continue to employ a 66-year-old president but which eagerly retains a 70-year-old counsel. The professional may reduce certain activities upon reaching age 65, but he continues to perform services of a consultative nature. Cases of abrupt and complete retirement at 65 among self-employed lawyers are so rare as to be almost nonexistent This is a characteristic of lawyers both of the higher and lower income groups, and is at least as true in the case of the so-called "country lawyer", as in the case of lawyers practicing in large cities.

Physical factors enter into the difference between employed persons and self-employed professionals. A man's ability to perform industrial labor is usually severely impaired after age 65. This is true not only of manual labor but also of the strains inherent in current administrative and executive duties. In contrast, advancing years do not usually impair the ability of an elder professional to render experienced counsel. Thus, as Dr. Isaac Rulinow has pointed out in his book *The Quest for Security*:

> The individual is not simply young or old. He is *too* old or *too* young for this or that. . . . He is too old for prize-fighting at 40, perhaps for track running at 30. . . . But age means not only deterioration. It also means *growth* . . . . One seldom reaches the U. S. Supreme Court bench under sixty. . . .

A less tangible, but equally significant social difference exists between employed persons and self-employed professionals. While employed persons are both more accustomed and more readily adapted to treatment on a group basis, self-employed professionals typify a pattern of life which emphasizes individual action and is alien to group restrictions or remedies.

In summary, the self-employed professional differs from the employed person because he is not forced into abrupt and complete retirement, because he usually continues substantially remunerative ac-

tivities after age 65, and because his entire life and training emphasize individual activity rather than group treatment.

II

The present Social Security Act was designed solely to meet the needs of employed persons, not of self-employed professionals. The present Social Security Act was designed solely to meet the needs of employed persons and neither its original proponents nor its draftsmen purported to consider the problems of self-employed professionals. This is proved by the fact that the original Act and all amendments since have specifically excluded lawyers and other self-employed professionals.

The law was designed to meet the social problem of the employed person who was abruptly forced out of the labor market upon reaching age 65. The fact that the person who remained in the labor market after age 65 was not considered part of the social problem which the Act sought to remedy can be seen in the statute's denial of social security retirement benefits to persons who earn more than a small maximum amount (originally $15 per month, currently $75 per month).

Thus, it can be seen that the law from the very outset has recognized that self-employed professionals are basically different from employed persons, and has been geared solely to the problems of the employed.

III

Self-employed professionals have specific needs which require legislative treatment. The current attempts to cover lawyers and other self-employed professionals under the Social Security System reminds us strongly of the mythical figure, Procrustes. Procrustes had a special bed upon which he made all men lie. If they were too short, he stretched them to fit his bed; if they were too tall, he cut off their limbs to size. The Procrustean bed approach to legislation is always unsound. Self-employed professionals should not be made to lie down in a Procrustean bed that does not fit them. Instead, a new bed should be custom built. Rather than forcing self-employed professionals under an act which admittedly was not designed to fit them, a legislative program should now be devised to meet their specific needs.

The extent to which the Procustean bed of the present Social Security System does not fit lawyers and other self-employed professionals can be seen, for example, in the statutory provision which prohibits payment of social security retirement benefits to persons who earn more than $75 per month. Most lawyers, if they were covered by the present Social Security Act, would make substantial payments all of their professional lives, only to reach age 65 and find that they were disqualified to receive benefits because they were still continuing to give counsel to their clients and to earn more than $75 per month. The "elder statesman" professional is an invaluable asset to his community. It would certainly be unfair to both the individual and the community to place the self-employed professional within a Social Security System that encourages inactivity at the arbitrary age of 65 upon penalty of forfeiting pension rights to which the professional has contributed.

The contribution which a lawyer would be called upon to make under the present Social Security Act would over a normal lifetime constitute a very substantial sum. It is to be noted in this regard that a self-employed lawyer pays the entire Social Security tax and does not share that burden with an employer, as is the case with employed persons. The cost for a self-employed lawyer would be $108 per annum which would increase under the present statute to $175.50 per year. It is to be recognized, however, that the amount of future contributions is not fixed and is subject to upward revision by the Congress. Under proposals embodied in bills already introduced and presently before the Congress the amount of a lawyer's contribution would be increased to $315 per year. In the light of experience it is only fair to assume that substantial increases will be required by future congressional action. It is as impossible to predict the amount of future Social Security contributions today as it was to predict income tax rates thirty years ago.

Lawyers should not seek to enter the Social Security System under the delusion that their personal expense would be trifling. Nor should self-employed lawyers seek to enter the Social Security System wishfully thinking, on the basis of Dean Arthur Larson's article in the November issue of this JOURNAL, that once in the System there is much chance of their succeeding in "urging that modifications be made in the benefit rates to bring benefits up to a point somewhere near what they would regard as a worthwhile pension".[1] Finally, the average self-employed lawyer should not seek to enter the Social Security System in the belief that his will be one of the relative infrequent cases described by Dean Larson in which there would be a dramatic "bargain".[2] For, as Dean Larson points out, "In the long run, since the System when fully matured is designed to be approximately self-supporting, contributors on the average will get out of it about what they put in, and there will be no such dramatic return".[3] In the case of the great number of self-employed lawyers who will be disqualified to receive benefits at age 65 because they continue to earn more than $75 per month, there will not only be no "dramatic returns", but hardly any returns at all.

Looking at the issue from the viewpoint of the public interest, Dean Larson states that self-employed lawyers have a "public duty" to enter the Social Security System because otherwise they "are not pulling their weight in this purely social obligation".[4] We do not agree that lawyers shirk a public duty by remaining outside the Social Security

(Continued on page 70)

1. 39 A.B.A.J. 973.
2. 39 A.B.A.J. 972-973.
3. 39 A.B.A.J. 972.
4. 39 A.B.A.J. 1023.

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Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *Except the Lord Build the House They Labor in Vain That Build It*

The laying of a cornerstone signalizes neither the all-important moment when it is resolved to create a building to carry out the purpose of those who envisioned it nor the equally important moment of the final realization of their vision. Why do men celebrate this act of lesser significance? Because people inspired with the ideal of building a cathedral, to use Mr. Justice Jackson's noble metaphor, are unwilling to postpone until full achievement of their ideal the consecration to that ideal of the stones and steel which give it substance. The same exaltation of spirit over materialism which has engendered aspiring humanity's need to have stones and steel consecrated as fast as they are fitted into the unfinished cathedral requires that we take care lest the splendid temple of law that is being created be treated as an end rather than as a means. We need not wait until its completion to put into action Mr. Justice Jackson's credo and to become the instruments of law in extending the reign of justice on earth but, with its completion, the practicing lawyer's ability to extend the reign of justice will be increased many fold. All that practicing lawyers have done with that specific aim in mind will be put at the disposal of the practicing lawyers who continue to carry on the work. Each of the practicing lawyers who carry on the work will be enabled to know what his fellows are doing. Means will have been created whereby the work may be carried on by scholars in association with practicing lawyers. Let us not be deluded, though, into thinking that the mere existence of the facilities is enough. The Bar must remain true to the lofty spirit that elevated the hearts of all who were present when the cornerstone of the American Bar Center was laid on November 2, 1953. Then spiritual dedication, practical experience and sound scholarship, united in the building which is growing from that stone, will accomplish our great purpose of bringing nearer the reign of justice on earth.

Editor to Readers

■ *The Pacific Northwest Regional Meeting*

Oregon lawyers who will be hosts for the Pacific Northwest Regional Meeting at Portland, May 24, 25 and 26, 1954, are looking forward to greeting and entertaining more than 1200 of their fellow lawyers and their families from eight states—Washington, Idaho, Montana, Utah, Wyoming, Nevada, California, and Oregon itself—who have been invited to participate.

James C. Dezendorf, of Portland, is the General Chairman of the meeting and he will have a committee on arrangements made up of bar leaders from each of the eight states.

Many Sections of the Association are expected to put on programs during the Regional Meeting.

Chairman Dezendorf reports that outstanding lawyers, judges and nationally known political figures will participate in the program, which will feature workshops and panel discussions as well as entertainment, including receptions, smokers and sightseeing.

Advance registration notices will be circulated soon, and lawyers are urged to send for their reservations promptly so that accommodations can be assured. All members of the Bars of the participating states are invited whether they are members of the American Bar Association or not.

The Portland Meeting will be the eighth Regional Meeting since 1950, when the House of Delegates authorized the revival of the Regional Meeting program.

The series of Regional Meetings, which began when the lawyers of the Southeastern states met in Atlanta in March of 1951, has proved the importance of the program to the Association and to the lawyers of America.

Dissemination of Legal Information by Home Office Counsel

■ Most lawyers are by now familiar with the fact that the American Bar Association has entered into discussions with those engaged in related lines of activity, such as accountants, life insurance underwriters, and so on. These discussions have resulted in the issuance of the Statements of Principles, governing the relationship between the various groups. One of such Statements of Principles was that entered into in 1948 between the American Bar Association and the National Association of Life Underwriters. Following that, there was formed a Conference of Lawyers and Life Insurance Companies, for the purpose of reviewing any practices by life insurance companies or by lawyers alleged to be in violation of the Statement of Principles. In connection with this, the Conference has recently had occasion to consider the scope and nature of activities of home office counsel of insurance companies. Following extended discussions, the Conference issued a report setting forth the limits for the practice of law by such counsel. The report has very recently been approved by the House of Delegates of the American Bar Association and by the Executive Committee of the American Life Convention and the Board of Directors of the Life Insurance Association of America. The report follows:

■ In this report the functions of home office counsel in disseminating legal information in conjunction with the Statement of Principles of the Conference of Lawyers and Life Insurance Companies are considered under four headings. These headings are as follows:

1. Disseminating legal information and specimen legal documents on the initiative of home office counsel.

2. Furnishing an agent, on the request of the agent, legal information in regard to a specific situation.

3. Furnishing a person who is already insured or a person who is a prospective client for insurance, on the request of such person, legal advice in regard to a specific situation.

4. Consulting with lawyer for insured or lawyer for a person who is a prospective client for insurance.

1. Disseminating Legal Information and Specimen Legal Documents on the Initiative of Home Office Counsel.

A. Information Bulletins

Home office counsel occasionally prepared information bulletins for distribution among the agents of the insurance company. A bulletin may describe recent developments in federal income, state or gift tax laws.

The proper protection of the public in connection with the sale of life insurance requires that life insurance agents be as well informed as possible about legal matters that have a particular bearing on life insurance. The agent should be cautioned not to give legal advice to clients on the basis of these bulletins, but to use them for his own edification. Any discussion with clients of underlying legal principles should always be made subject to confirmation by the client's counsel.

B. Specimen Legal Documents

Home office counsel may properly prepare legal documents to which the insurance company is a party —for example, settlement provisions under one of the options in the insurance policy. However, preparation of legal documents to which the insurance company is not a party and that are concerned with the purchase of life insurance in a particular case or the disposition of insurance proceeds of a particular policy after the proceeds have been paid out by the company are not, in the opinion of the Conference, within the proper sphere of a home office counsel's operations.

The Conference believes that the company may furnish the insurance agent with specimen legal documents that are related to the purchase of life insurance or the disposition of insurance proceeds. The agent should be informed that these specimen legal documents are prepared and disseminated for reference by the client's own counsel in drafting the particular document. Specimen documents furnished an agent should clearly indicate that they are sample forms and that the client's own counsel should be consulted. The legal document which is to be executed must be drawn by the client's own counsel.

2. Furnishing an Agent, on the Request of the Agent, Legal Information in Regard to a Specific Situation.

The inquiries which an agent may address to home office counsel which can only be answered by giving the agent legal information may relate to a wide variety of situations. The appropriateness of the home office counsel answering the inquiry and the form which an answer should take when an answer is appropriate depend on the particular inquiry.

A. Inquiry relating to a provision in a policy.

The home office counsel should readily give an interpretation of the meaning of any language in an existing or specimen insurance policy. Such interpretation can be incorporated in a letter sent to the agent and the agent should be free to show such a letter to a client or to give the client a copy of such a letter.

If the inquiry from the agent regarding a provision in the policy involves the legal consequences of a particular provision, such as whether the settlement provision qualifies for the marital deduction under the federal estate tax law, the Conference believes that it is appropriate for the home office counsel to express to the agent his opinion with the suggestion that this be confirmed by client's counsel

B. Inquiry relating to provisions of legal documents other than the policy of insurance.

If an inquiry from an agent relates to the meaning of a legal document for the purpose of determining whether the purchase of insurance of a certain type is authorized, the Conference believes that the home office counsel may properly advise the agent whether the insurance company will consider an application for insurance under such legal document, whether it will accept a premium payment, and the reasons for its conclusion.

If the inquiry from the agent refers to the tax consequences of a particular legal document in so far as the life insurance is concerned, the Conference believes that it is appropriate for home office counsel to express his opinion to the agent provided home office counsel states that his opinion should be confirmed by client's counsel.

C. Participation of home office counsel in sales interview with agent and counsel.

The Conference believes that when home office counsel is asked to participate in a sales interview with an agent and a client, the home office counsel should strongly urge that the client's counsel be present, both for the benefit of the client and home office counsel. The presence of home office counsel in such an interview will inevitably lead to the discussion of legal questions which the client might reasonably be expected to rely on in the planning of his affairs.

D. Inquiry seeking suggestion for a particular estate plan.

If the inquiry from the agent seeks specific suggestions which might be made to a client so that he will have an intelligent estate plan, the Conference believes that the home office counsel should confine his opinion to the aspects of the plan as it relates to insurance, with the recommendation that the client see his attorney for the formulation of the over-all estate plan.

3. Furnishing a Person Who is Already Insured or a Person Who is a Prospective Client for Insurance, on the Request of Such Person, Legal Advice in Regard to a Specific Situation.

When a specific inquiry is made by an insured or a prospective insured on a legal problem relating to his existing or contemplated insurance, the Conference believes that it is within the province of home office counsel to answer the inquiry, but that it is clearly improper for it to render legal advice on noninsurance subjects.

4. Inquiry from Client's Counsel.

The Conference believes that the home office counsel should encourage the agent, insured, or prospective insured to have the client's counsel direct inquiries to home office counsel.

The membership of the Conference is as follows:

Representing the American Bar Association:

Thomas J. Boodell, Co-Chairman, Chicago, Illinois.
Warren H. Resh, Co-Secretary, Madison, Wisconsin.
Cuthbert S. Baldwin, New Orleans, Louisiana.
A. James Casner, Cambridge, Massachusetts.
Abraham N. Davis, New York, New York.
E. N. Eisenhower, Tacoma, Washington.
John D. Randall, Cedar Rapids, Iowa.

Representing the American Life Convention and the Life Insurance Association of America:

John Barker, Jr., Co-Chairman, Vice President and General Counsel, New England Mutual Life Insurance Company, Boston, Massachusetts.
H. S. Redeker, Co-Secretary, General Counsel, Fidelity Mutual Life Insurance Company, Philadelphia, Pennsylvania.
Vincent B. Coffin, Senior Vice President, Connecticut Mutual Life Insurance Company, Hartford, Connecticut.
Deane C. Davis, President, National Life Insurance Company, Montpelier, Vermont.
Roger Hull, Executive Vice President, Mutual Life Insurance Company of New York, New York.
Powell B. McHaney, President, General American Life Insurance Company, St. Louis, Missouri.
H. Bruce Palmer, Executive Vice President, Mutual Benefit Life Insurance Company, Newark, New Jersey.
Sylvester C. Smith, Jr., General Counsel, Prudential Insurance Company of America, Newark, New Jersey.
Walter Weissinger, Agency Vice President, New York Life Insurance Company, New York 10, New York.
William P. Worthington, Executive Vice President, Home Life Insurance Company, New York, New York.

Correction: We regret that through a transposition of pages in our December, 1953, issue, the conclusion of the story on activities of the Committee on Unauthorized Practice of the Law (page 1112) appeared on page 1107 under the heading "Tax Notes".

Books for Lawyers

JURISPRUDENCE IN ACTION: A PLEADER'S ANTHOLOGY. *Essays Selected by a Committee of The Association of the Bar of the City of New York, with Foreword by Robert H. Jackson. New York: Baker, Voorhis & Co., Inc. 1953. $5.75. Pages 494.*

Here are seventeen readable essays on subjects related to law—each written by a well-qualified author. Each essay is preceded by a brief biographical sketch of the author. Many of these sketches include excellent editorial comments both upon the man and his work. The essays, whether considered singly or as a group, will be found to be useful instruments in the process of "Post Admission Legal Education". Some of the articles, say the editors, "were chosen to afford the practitioners an insight into the philosophy of law—hence the pieces by Ames and Holmes, Cohen, Hand, Pound, Radin. Some are jurisprudence in its practical application. Thus the articles by Clark and Goodhart, dealing with work-a-day tools of the lawyer, search shrewdly into theories of the law. Six are direct treatments of some legal technique—Curtis on drafting, Davis and Lord Macmillan on advocacy, Cardozo and Pollock on judicial expression, Shientag on cross-examination." Three essays—by Holdsworth, Maitland and Vinogradoff respectively—are included in order to impress upon the practitioner the practical importance of legal history.

The essays differ greatly in character. Some are the fruits of ripe scholarship while others are the product of wide experience in the practice and administration of the law. In his admirable foreword, Mr. Justice Jackson speaks thus of the several authors: "Only a few men of any generation have been so gifted with sensitivity to gradual movement in the realm of the intellectual that they are able to recognize the direction, speed and limits of a drift in legal doctrine."

Within the limits of a book review it is impossible to do more than state, in the case of each author, the central thought expressed in his essay.

James Barr Ames (of blessed memory) traces the process which during six hundred years has been bringing our system of law into closer harmony with moral principles. In this process courts of equity —acting *in personam*—have played an essential part. Much remains to be accomplished but the trend is unmistakable. The reviewer finds himself wondering whether the modern tendency to consolidate "legal" and "equitable" principles and to confide their administration to a single system of courts, will help to accelerate the process of reform. Is it or is it not desirable that correction of that wherein the law by reason of its universality is deficient should remain the responsibility of judges whose recognized function it is to focus attention upon the attainment of justice rather than upon the importance of putting an end to litigation? Should we be gainers or losers were Coke and Ellesmere to be melted into one?

"Law and Literature" is the theme of Mr. Justice Cardozo. In his inimitable style he divides judicial opinions into six classes and also suggests to advocates some useful "don'ts". He is impressed by the "magisterial and imperative" type, of which Marshall's opinions are perfect examples; but he recognizes that for the use of ordinary mortals some of the other types are more appropriate. He is, of course, strong for clarity and conciseness in opinions and for brevity—at least in arguments. A doubt may, however, be hazarded whether as an educational document this most engaging essay will prove effective.

Judge Clark, of the United States Court of Appeals for the Second Circuit, contributes a thought-provoking discussion of the relative merits of *Swift* v. *Tyson* and *Erie RR.* v. *Tompkins*. He gives some weight (although less than the reviewer would accord) to the fact that the later case better accords with the conception of the United States as a federal union while the older lends itself to the idea of central sovereignty. He emphasizes the difficulties resulting from the *Tompkins* decision, of which he finds the most troublesome to arise when the local law is "confused or nonexistent"; but he concludes that the solution of the resulting difficulty is not "beyond the scope of existing decisions of the high court properly applied". His plea, in this connection, is "for freedom for the federal judicial process to be judicial".

"Law and the Scientific Method", by Morris R. Cohen, is a closely-reasoned argument to show that recourse to deductive reasoning offers the only hope of supplying the desperate need of American law for scientific elaboration. He finds that those who, like Ames, have relied on the inductive method of teaching law through the study of cases were inclined "to set up the law of England at the end of the eighteenth century as the ideal of the common law". How great a misapprehension this is will be recognized by any reader of Ames' essay in the very volume under review.

In his essay on "A Better Theory of Legal Interpretation" Charles P. Curtis proposes to substitute a search for the meaning of words to the person addressed for the conventional quest of the intention of the man who used them. "The meaning of words is to be sought, not in their author, but in the person addressed,

in the other party to the contract; not in the grantor but in the grantee; not in the testator but in the executor or the legatee; in the defendant who is charged with violating the statute, in the conduct of any person who is acting under the authority and either within or without the authority of the words to be interpreted. Words are but delegations of the right to interpret them, in the first instance by the person addressed, in the second and ultimate instance by the courts who determine whether the person addressed has interpreted them within their authority." This is the "Better Theory" with which he persuasively replaces the medieval quest of subjective intention whether in its conventional form or as modified by Williston or Holmes. The suggested theory, he correctly contends, best conforms to the actual practices of draftsmanship.

John W. Davis, in "The Argument on Appeal", proclaims a "decalogue" by which every such argument should be governed. Each of these injunctions is stated with clarity, brevity and force and in each case the rays of a quiet humor play like sunshine over the surface of his utterance. The reviewer ventures the opinion that no essay in the volume will be found to have greater appeal to students.

Professor Goodhart, in his essay entitled "Determining the *Ratio Decidendi* of a Case", arrests the attention of the reader by asserting that "the reason which the judge gives for his decision is never the binding part of the precedent". Indeed the reason given seems scarcely to be worth considering, for it may be obviously wrong and yet the decision may become a landmark of the law. Proceeding in entertaining fashion to prove his point, the author ends by giving the formula for determining the "principle" for which a case stands as distinguished from the reason given by the court. The formula seems to be reducible to this: take account only of those facts treated by the judge as material and on which his decision is actually based. The reviewer suggests that if Morris Cohen were alive and he and Professor Goodhart were required to interplead, a lively controversy would be in the making.

Learned Hand—a name to conjure with—is represented by an essay on "The Contribution of an Independent Judiciary to Civilization" and also by a brief review of Cardozo's "Nature of the Judicial Process".

Judge Hand, in his essay, is presumably speaking of judicial independence—however attained—rather than of particular devices for safeguarding it. He discusses the administration of both "Enacted Law" and "Customary Law" and finds the independence of the judiciary essential to the well-being of both. In the field of constitutional law, he reaches the same conclusion both with respect to those parts of a constitution concerned with the distribution of political power and those parts which are intended to insure their just exercise. An ordinary writer (the reviewer, for instance) would have based his argument for independence on the proposition that the decisions of judges who are not independent are really the decisions of those upon whom the judges "depend"—and that therefore the issue is between an independent judiciary and none at all. Not so Judge Hand. He goes straight to the heart of the problem and by the weight of his name and the charm of his style makes his conclusions seem self-evident and unassailable. He deals gently with Cardozo's emphasis on the subjective or personal element in the judicial process and observes that if one accepts the postulate that this is a government of laws not of men, there will be many who think Cardozo's book "unorthodox". It is fairly clear, however, that Judge Hand does not share their opinion.

Sir William Holdsworth holds the reader's interest and compels his admiration by a masterly presentation of the claims of Lord Holt and Lord Mansfield to judicial immortality.

In "Path of the Law" Mr. Justice Holmes is at his best. A single self-revealing paragraph from his essay may be quoted in lieu of a reviewer's attempt to describe it.

> I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

In a stimulating article, Lord Macmillan discusses "The Ethics of Advocacy". He presents the arguments usually advanced to convict the advocate of insincerity and he answers each in convincing fashion. Every student, whether or not he has been admitted to the Bar, will do well to read this essay with attention—emanating, as it does, from one whose professional and private character was beyond reproach.

The hand of the master will be recognized in Professor Maitland's "Prologue to the History of English Law". This is a condensed but adequate account of the rebirth of Roman law in the eleventh century, of its profound influence on then-existing European legal systems and finally of the place in English life which Roman law held until there developed a healthy resistance to foreign dogma. This essay makes fascinating reading for the student.

Sir Frederick Pollock, in a somewhat discursive but readable essay, gives illustrations of both the dangers and the advantages of "Judicial Caution and Valour".

Roscoe Pound, whose comprehensive and accurate knowledge of law

is justly regarded as phenomenal, answers with a resounding affirmative the question "Do We Need a Philosophy of Law?" He finds it to be within the province and capacity of our law schools to train the rising generation in "a social, political and legal philosophy abreast of our time". Only thus, he believes, can our law be led to hold a more even balance than at present between individualism and socialism.

Max Radin, with characteristic acumen, discusses "The Permanent Problems of the Law". The law he defines as "a prediction of what the law-man will say on the specific question if it ever comes before him". It follows that the two permanent problems are those which deal with our relation to the judge and his relation to us. With a skepticism possibly characteristic, he observes that "there are many other problems of law, and they may or may not be solved, but whatever other problems of law are solved, these in all likelihood will never be." So there we are!

Suggestions about cross-examination are usually based on the author's own trial experiences. The article on this subject by Judge Shientag reflects the impression made upon him as a judge by the cross-examinations in cases tried before him. This valuable article cannot be justly summarized: it must be read in its entirety. When so read, it will be found well worth while.

It is a fitting climax to the series of essays here reviewed that the volume containing them should end with an appreciation of Maitland by Paul Vinogradoff. If, as suggested in the introduction, this learned Russian was responsible for leading Maitland to devote himself to legal history, we certainly owe him a great debt of gratitude. The reader may be assured that the Englishman was all that the Russian says of him—and more. It so happens that this reviewer enjoyed Maitland's friendship, visited him in Cambridge and corresponded with him on subjects of common interest. It was Maitland's brilliant introduction to Gierke's "Political Theories of the Middle Age" that first excited this reviewer's admiration for the English scholar. It is a satisfaction to be able to say with confidence that all the authors of essays in the volume here reviewed are worthy of Maitland's companionship and that they themselves can have no more stimulating fellow-laborer than he.

Jurisprudence in Action should meet with ready acceptance both by those who wish to know more of the extent of our debt to the past as well as by those who are chiefly concerned with the today and tomorrow of the common law.

GEORGE WHARTON PEPPER

Philadelphia, Pennsylvania

THEY ESCAPED THE HANGMAN. *By Francis X. Busch. Indianapolis: The Bobbs-Merrill Company, Inc. 1953. $3.75. Pages viii, 301.*

With this third volume of *Notable American Trials*, Mr. Busch again contributes most interestingly to the nontechnical literature of the law. Four cases are presented in detail, with background sketched in to afford perspective for each.

The *Caleb Powers* case, in addition to relating a bitterly contested murder trial, affords a fundamental illustration of how the mechanisms of democratic government can collapse and what happens when they do. The *Rice-Patrick* case will satisfy the most avid murder mystery reader. The *Hall-Mills* case will introduce the "pig woman" to those who are too young to remember, and recall her to those who are not. The newspaper headlines evoked by the story of the amorous divine and the enamored choir singer may illustrate what the public considers interesting and what the legal profession regards as permanent in the law. Finally, to complete the variety, is the case of Hans Haupt, tried for treason.

The selection is interesting and the treatment is that of an expert. The result is some fine evening reading, for other people as well as lawyers.

EDWARD W. CLEARY

Urbana, Illinois

COUNSEL FOR THE DAMNED. *By Lowell S. Hawley and Ralph Bushnell Potts. Philadelphia and New York: J. B. Lippincott Company. $3.75. Pages 320.*

This is a two-man review of the biography of a nationally famous Seattle defense lawyer—part one, by a member of the Seattle Bar and part two, by a veteran Seattle newspaperman and writer, both of whom knew the biographee well.

BY MR. JOHN N. RUPP:

Notwithstanding solemn deploring resolutions of the Bar (see AMERICAN BAR ASSOCIATION JOURNAL, November, 1953, pages 1028-9), the defense of unpopular causes has harassed brilliant advocates throughout legal history. In this country in recent times no one has exemplified this vexing social phenomenon more strikingly than George Francis Vanderveer, of Seattle, defender of the Everett, Washington, I.W.W. rioters, of Big Bill Haywood and other I.W.W. chiefs during World War I before Judge Kenesaw Mountain Landis in Chicago, of the I.W.W. members charged with the Centralia, Washington, 1919 Armistice Day murders of American Legionnaires, and of numerous others charged in those days with criminal syndicalism. "He was feared, hated, criticised and condemned, but the legend of his wizardry in the courtroom continued to grow" (page 268).

In Vanderveer's life story, *Counsel for the Damned*, written by Ralph Bushnell Potts, a Seattle attorney, and Lowell S. Hawley, a professional writer, we swiftly follow this native of Grinnell, Iowa, from his college days at Stanford University (classmate of Herbert Hoover) and Columbia University Law School, through a brief career in New York City, his coming to Seattle at the height of the Alaska gold rush days, his association with the legal and social elite of Seattle during those exciting times, his adventures in Seattle's Montmartre, known as the Skid Road District (actually the area of Seattle's first logging road, but so named by a dynamic Seattle clergy-

man, Dr. Mark Matthews, who described it as the area in which "human souls were being skidded down the same old road to perdition"), his turbulent career as prosecuting attorney of King County, his feuds with a leading Seattle newspaper, his defense of the unpopular I.W.W. causes, Seattle's general strike in 1919, which made its Mayor Ole Hanson nationally famous, the great *Olmstead* wire-tapping search and seizure case (277 U. S. 438, lost five-to-four, after certiorari had been twice denied in companion cases, and once in No. 532, Vanderveer's case, and then jurisdiction taken on Vanderveer's petition for rehearing of the certiorari denial, 276 U. S. 609), to the end of his career in 1942, as a brilliant, dour, resentful, convention-defying, but highly successful civil practitioner, adviser of labor unions, owner of the Seattle Pacific Coast League Baseball Club, and still, on occasion, actor in the role of his self-confessed "inescapable destiny —to serve as counsel for the damned".

By Mr. Douglass Welch:

He was a brilliant man; everyone said he was brilliant, even his enemies, of whom he had many.

He often tangled with newspapers and newspapermen and yet reporters were among his best friends, attracted to him by his dark moods and the flashes of brilliance and wit that often illuminated them.

He was very quotable. A court proceeding in which he participated always "made" a story. He was as much an actor as he was a lawyer, and his cross-examinations of witnesses, whatever the case, were dramatic and exciting.

His questioning skillfully, painstakingly built to climaxes of headline nature. Witnesses dissolved in tears or fainted or sat mute and helpless, paralyzed by doubts of their own veracity and perception, or they rose in anger and denounced him.

We remember him best when he was at his mildest—while he was sitting in a recessed courtroom awaiting the deliberation and verdict of a jury.

We have had many such hours with him, but, strangely, looking back, we don't ever recall his having recounted the days when he was fighting for the I.W.W. locally and nationally and when his name was anathema to so many.

He talked to us and our generation of newsmen about current events in a quiet, mocking way; he made intellectual fun, and, now, looking back, we realize that he often "worked for laughs", that he keenly enjoyed the impact of his caustic, incisive commentaries.

But somehow, as you read his life again, you think of him, as you thought of him when you knew him personally, as a study in futility, a man who made sacrifices not so much to serve social causes but because he himself was disturbed and unhappy and rebellious and hostile.

He is represented as disillusioning and affronting the very I.W.W. leaders he defended, causing them to cry out publicly that he was unstable and unwilling to let himself be absorbed in a cause, that he was really not dedicated to it at all.

Vanderveer is represented as being anti-Communist, and certainly that was true. Above everything else he was an individualist, and if he had any single strong continuing loyalty it was toward his conception of the rights of the individual.

John N. Rupp
Douglass Welch

Seattle, Washington

THE UNEASY CASE FOR PROGRESSIVE TAXATION. *By Walter J. Blum and Harry Kalven, Jr., Chicago: The University of Chicago Press. 1953. $2.50. Pages viii, 107.*

This is an erudite, exhaustive and sometimes abstruse demonstration that none of the theories offered to support progressive (as distinguished from proportional) taxation of income is satisfactory. Many such theories have been propounded by many distinguished economists. The authors have been amazingly industrious in digging up quotations from what must be nearly all of them, and in analyzing each theory at some length, before casting it neatly on the dust heap with the others.

The long essay is not especially easy reading for one who does not think easily in terms of the "rectangular hyperbola"; merely to understand a "declining utility curve" is not enough. Nevertheless, one emerges with the conviction that the two professors have probably examined all relevant opinions; and that whatever one's original premises, it is reasonable to accept their conclusion that a good case for progressive taxation has not yet been made.

The essay first considers the constitutional history of progression, which is regrettably sparse; in the *Brushaber* case*, Mr. Chief Justice White dismissed the objection very cavalierly. The essay then considers the argument that progression equalizes sacrifice among taxpayers; that money has a declining utility. The latter proposition is found to rest on sheer intuition and the elaborate analysis in terms of sacrifice and utility doctrine, to collapse.

The next several sections deal with the perplexities of justifying progression on the ground that it lessens economic inequality. "The reduction of economic inequality has been one of the principal justifications for progression. . . ." The authors appraise the advantages and disadvantages to the earners and to the community as a whole of the redistribution of income. The most acceptable argument for progression, as well as the simplest, seems to be that of Henry Simons quoted by the authors (page 72): "The case for drastic progression in taxation must be rested on the case against inequality—on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely." In other words, progressive rates can best be supported on the basis of an ethical conclusion that some of the wide discrepancies

*240 U. S. 1 (1916).

in income should be levelled out; and that progressive rates are a good means for the purpose.

Finally, the authors discuss at some length the case for progression as keyed to the exemption from tax of a minimum amount of income.

The authors are certainly correct in the belief that the fairness of steeply progressive tax rates is being considered now to an extent which it never was when the rates ranged not from 22.2 per cent to 92 per cent but from 1 to 6 per cent. Since much of the discussion and debate will take a purely political character, it is fortunate to have available a painstaking discussion on economic grounds. Political questions can be greatly illuminated by objective academic discussions and convictions originally held by only the exceptionally well-read can come to infect the whole democracy. This essay on progressive taxation is thoughtful and timely. It is worth careful study not only by lawyers, but by intelligent citizens generally, particularly those who have hitherto assumed that steeply progressive surtax rates are an axiomatic American institution, like the Bill of Rights.

ROSWELL MAGILL
New York, New York

THE UNEASY CASE FOR PROGRESSIVE TAXATION. *By Walter J. Blum and Harry Kalven, Jr., Chicago: The University of Chicago Press. 1953. $2.50. Pages viii, 107.*

The authors of this book have made a very thorough study of the case of progressive taxation versus proportionate taxation. Many quotations from both proponents and opponents of each system are scattered throughout the treatise.

I think the authors recognize that any tax based on percentage of income is, in reality, a progressive tax. In other words, the man with the greater income pays the greater tax. If there is an exemption, the progression is greater. However, as long as the tax rate on all taxable income is the same, the tax is called a proportionate tax, but if the tax rate increases as the amount of income increases, it is referred to as a progressive tax.

It is pointed out that the progressive system of taxation has received the approval of the courts, but the principal cases referred to, particularly in the Supreme Court, dealt with very small rates of progression. Mr. Justice White stated that when the rates were increased to the point of oppression or approached confiscation, the matter might properly be reconsidered, but in the treatise progressive taxation is assumed to be constitutional. The discussion centers around economic theories and their validity.

The authors have cited many theories to justify progression. In my opinion, they are largely specious. The benefit theory is rather summarily dismissed, and rightly so, because it is perfectly obvious that even though persons with substantial income and large taxes receive considerable benefit from the Government, it is probably true that many of the persons with small incomes receive many times more benefits from the Government than persons with larger incomes. The ability to pay argument is also dismissed with rather short shrift, although this has been the principal argument of the advocates of progressive taxation. If there is an exemption commensurate with the subsistence level, there is ability to pay. The person who has to pay only the minimum tax rate can pay the tax just as easily as the person who has to pay at the higher tax rates imposed upon higher incomes. This also presupposes that a certain amount of revenue must be obtained. The test should be the amount of expenditures which are necessary and the obtaining of the revenue to meet those expenditures. Instead of that, the test seems to be to determine how much revenue can possibly be raised and then to fix the expenditures at that level or in excess thereof.

Progressive income tax violates the fundamental American principle that a hard-working, thrifty person is entitled to the fruits of his labor. The real difference in incomes, in the main, results from intelligence, hard work and the willingness to forgo immediate spending and save for the future. Such savings are invested in productive property, which is not only of benefit to the state but is of benefit to the person who saved and invested. The amount of income on inherited wealth is relatively unimportant when compared with the total income of the country. As soon as we depart from these fundamental principles, we approach socialism, which is practically the same as communism, as practiced in those countries where there is a free right to vote. No socialist government has ever survived, and the communist government will survive only so long as it can maintain its tyranny and dictatorship through military power.

It seems to me that each theory set out in support of progressive taxation, whether it be the economic equality theory, equality after taxes theory, or whatever you may call it, leads to the same conclusion—that the purpose is to cut down the more successful in favor of the indolent and the ne'er-do-well, with a "take" by employees of the state.

I think anyone cognizant of the facts realizes that the rates of tax based on progression have reached the point of diminishing returns. I do not think that what has been said is a departure from the book before us. It sets out and discusses various theories that have been advanced to justify progressive taxation. The real theory is the socialist theory and the political factor, in which the politician can say to the man who is taxed at a 20 per cent rate: "Look, we are taxing other people at 90 per cent." The principle of progressive taxation is here and because of its political feasibility it is probably here for some time to come.

There may be some justification for an exemption to provide for subsistence and for some fair degree of progression. There is no justifi-

cation when you have passed the maximum return and are imposing taxes of oppression and confiscation. The authors speak of the proposed constitutional amendment to limit the maximum income tax rate to 25 per cent. If this were adopted, there could be some progression but no excessive progression. It is argued by its proponents, and it may well be that if fairly applied, it will provide the maximum revenue. In peace time no citizen should be taxed in excess of 25 per cent of his income.

As stated, the authors have done a considerable job. They have not strongly advocated progression, certainly not of the steep kind we now have. Primarily, they have collected the arguments of the rabid and less rabid proponents of progression and, at the same time, have given consideration to the views of the old-time classical scholars, such as McCullough and Mill.

ALBERT L. HOPKINS
Chicago, Illinois

[EDITOR'S NOTE: In view of the interest shown in the debate on the proposed Reed-Dirksen Amendment, which would limit Congress' power to levy a progressive income tax, it was felt that two reviews of Professors Blum and Kalven's study of the theory of progression were not inappropriate.]

EMINENT DOMAIN—VALUATION AND PROCEDURE. *By Alfred D. Jahr. New York: Clark Boardman Company, Ltd. 1953. $20.00. Pages xxviii, 736.*

To cover a broad field like eminent domain in a single volume is a proceeding which necessitates the use of a Schmidt wide-angle telescope, rather than of a microscope.

Strictly speaking there is no law except that of a single jurisdiction, and this fact is emphasized when the matter dealt with is purely statutory as in this instance.

Bearing in mind this problem, it seems that Mr. Jahr is not only well qualified by experience on both sides of eminent domain cases to write this volume, but that he has handled his task well.

The title seems to limit the work somewhat to valuation and procedure, but we believe the survey of the entire field is more ably handled and of more value than the mentioned divisions.

For example, the distinction made between eminent domain, police power and taxation in the early pages of the volume is especially worthy of note.

The change in what constitutes public use in changing times and the list of uses adjudicated to be public is valuable.

Unfortunately, in a single volume, it is impossible to deal with all uses and changes such as the development of freeways and superhighways. The study on the closing of highways is very well done.

The survey does not detract from the study of values to the owner and the condemnor which is well handled, although the list of states under the study of special benefits is not complete. We find other lists of states taking different sides of a question as would be expected in a work of the nature undertaken.

The sections devoted to procedure and to forms are evidently largely based on practice in New York and citations from that state predominate throughout possibly to a greater extent than is justified, even though the metropolitan nature of that state creates a greater volume of judicial decisions on the subject.

On the whole the author has done well to limit an encyclopedic study to a single volume. His thinking is ahead of that of the courts but conservatively in line with progressive nonjudicial thinking.

E. D. GRIGSBY
Macomb, Illinois

UNITED STATES GOVERNMENT ORGANIZATION MANUAL, 1953-1954. *Compiled by the Federal Register Division of the National Archives and Records Service, General Services Administration. Washington: Government Printing Office. Sold by the Superintendent of Documents, Washington, 25, D. C. $1.00. Pages 734.*

The latest edition of this Government best-seller shows the organization of the Federal Government as of July 1, 1953, and includes the new Department of Health and Welfare and many other changes made pursuant to the President's Reorganization Plans of 1953. It also includes the names and titles of approximately 3500 key officials.

As the official organization handbook of the United States Government, the manual contains sections on all three branches of Government. Its descriptive material outlines the legislative authority, purpose, functions and activities of each agency, and includes thirty-four charts showing the organization of Congress, the executive departments and the larger independent agencies as of July 1.

PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW. *By John Wild. Chicago: The University of Chicago Press. 1953. $5.50. Pages 259.*

In days of calamity, danger and distress, man seeks more readily for firm roots to which to tie his hopes and through which he would restore and maintain his sense of security. That is why we read so much today about mature minds, conservative minds and returns to this, that or the other bulwark of ancient or medieval days. It is in that spirit and in keeping with that current fashion that John Wild, a professor of philosophy at Harvard, turns back to Plato.

Before he can restore Plato to favor and set him up as the exemplar of a realism to combat Cartesianism, Kantianism, Eudaemonism, Subjectivism, Utilitarianism and some of the other isms the author does not like, he first defends Plato against some of his current critics, particularly, Warner Fite, Winspear, Crossman and Popper, as well as Reinhold Niebuhr

and Arnold Toynbee. Wild queries as to whether Plato can rightly be charged with being "an irrational dogmatist, a militarist, a totalitarian, a racialist, a propagandist for the closed society, and finally an implacable enemy of modern 'democracy' ".

According to our author, Plato is none of these things and those who believe to the contrary have misread the dialogues and have misunderstood the importance of Plato's realistic ethics of natural law. It all seems to boil down to a matter of emphasis upon which element of the dialogues one would fancy Plato to be fashioning as his own thought, the Lacedaemonian attitudes that abound in *The Republic* and other dialogues, and which just cannot be disregarded, or the elements of a natural law theory that the author, along with Solmsen and Cairns, finds so convincing.

The prevailing view has long placed the origins of natural law doctrine in Stoicism, but it is the chief challenge of this work to argue for an earlier birth in the thoughts of Plato. Wild defines natural law, or the term he likes to equate with it, moral law, as "a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion". Values are thus not man-made, but existent "outside" in things. "Value and existence are closely intertwined." Thus, since Plato is hailed as the earliest expositor of a view of existential moral value, he stands not only as the progenitor of natural law theory, but the first in the parade of Existentialists, and, as such, crowned anew as a modernist in the very van of fashion.

With a Platonic delineation of what Professor Wild styles as the proper view of natural law, he turns to a survey of natural law doctrine in Western thought. The Platonic conception is used as a touchstone for criticism. Where later analysis conforms to this presentation of the Platonic, it is hailed as true, and where there are deviations, they are, presumably, within the realm of evil.

The application of these theses to the various thinkers coming after Plato who elaborated natural law doctrine along these lines is offered as proof of a prevailing Platonic influence. In the case of Aristotle, however, the author fails to give full significance to marked differences from Plato, as emphasized by such recent writers as Hamburger, in his *Morals and Law: The Growth of Aristotle's Legal Theory*, or, in the case of subsequent philosophers, the recognized distinction between an ecclesiastical and a secular natural law doctrine.

The author presents throughout a vigorous argument for the revival of a realistic natural law. The volume deserves serious study, even though it may be characterized as one of those "All out of step but Jim" books with no one worthy of note save those who concur.

LESTER E. DENONN
New York, New York

Recent Books

ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY & HIS TERRITORIAL CASES. By William Baskervill Hamilton. Durham: Duke University Press. 1953. $12.50. Pages x, 498.

ANNUAL SURVEY OF AMERICAN LAW, 1952. New York: New York University School of Law. 1953. $10.00. Pages x, 859.

CASEBOOK OF LAW AND BUSINESS, Second Edition. By William H. Spencer and Cornelius W. Gillam. New York: McGraw-Hill Book Company, Inc. 1953. $8.00. Pages xiii, 968.

CORAM NOBIS: COMMON LAW—FEDERAL—STATUTORY. By Eli Frank. Albany: Newkirk Associates, Inc. 1953. Pages vii, 206. $7.50.

FEDERAL COURTS AND THE FEDERAL SYSTEM. By Henry M. Hart, Jr., and Herbert Wechsler. Brooklyn: The Foundation Press. 1953. $11.00. Pages lvii, 1,445.

GROWTH OF SCANDINAVIAN LAW. By Lester Bernhardt Orfield. Philadelphia: University of Pennsylvania Press for Temple University Publications. 1953. $8.50. Pages xx, 363.

JUSTICE GEORGE SHIRAS, JR. By George Shiras, 3rd. Pittsburgh: University of Pittsburgh Press. 1953. $4.50. Pages xx, 256.

LIE DETECTION AND CRIMINAL INTERROGATION. By Fred E. Inbau and John E. Reid. Baltimore: The Williams & Wilkins Company. 1953. $5.00. Pages xi, 242.

MANUAL OF LEGISLATIVE PROCEDURE. By Paul Mason. New York: McGraw-Hill Company, Inc. 1953. $6.50. Pages 640.

MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE. By Jefferson B. Fordham. Chicago: American Municipal Association. 1953. $1.25. Pages 30.

MORRIS ON TORTS. By Clarence Morris. Brooklyn: The Foundation Press, Inc. 1953. $5.00. Pages xxviii, 384.

OFFICE MANAGEMENT MANUAL FOR LEGAL AID SOCIETIES. By Junius L. Allison. Chicago: Public Administration Service. 1953. $2.00. Pages vi, 109.

ROBERT M. LA FOLLETTE. Two Volumes. By Belle Case La Follette and Fola La Follette. New York: The Macmillan Company. 1953. Pages xx, 1,305. $15.00.

SEASONGOOD, CASES ON MUNICIPAL CORPORATIONS, Third Edition. By Chester James Antieau. Chicago: Callaghan & Company. 1953. $9.00. Pages xxxiv, 773.

TREATISE ON LABOR LAW. By Morris D. Forkosch. Indianapolis: The Bobbs-Merrill Company, Inc. 1953. Pages xiv, 1,197. $10.00.

TRIAL JUDGE IN SOUTH CAROLINA. By Lanneau DuRant Lide. Columbia: University of South Carolina Press. 1953. $3.50. Pages xv, 114.

WIT AND WISDOM OF OLIVER WENDELL HOLMES, FATHER AND SON. Edited by Lester E. Denonn. Boston: The Beacon Press. 1953. $3.00. Pages xiv, 116.

1954 ANNUAL MEETING

CHICAGO, ILLINOIS, AUGUST 15–20, 1954

The Seventy-Seventh Annual Meeting of the American Bar Association will be held in Chicago, August 15-20, 1954. Further information with respect to the meeting will be published in the JOURNAL from time to time.

In requesting reservations, please note the necessity of remitting the registration fee and of furnishing information as to your preference in hotels (first, second and third choice), definite arrival date and whether such arrival will be during the day or evening, and probable date of departure.

Applications for reservations will be accepted only from members of the Association and their guests.

Reservation confirmations will be mailed approximately ninety days before the meeting convenes.

Hotel Reservations

HEADQUARTERS—CONRAD HILTON HOTEL

HOTEL ACCOMMODATIONS, ALL WITH PRIVATE BATH, HAVE BEEN SECURED IN THE FOLLOWING HOTELS: CURRENT RATES, AS FOLLOWS, MAY BE SUBJECT TO CHANGE:

Hotel	Single	For Two Persons		
		Double Bed	Twin-Beds	Parlor, Bedroom & bath
BLACKSTONE (Michigan Ave. at Balbo)	$5.00-$12.00	$13.00-$15.00	$13.00-$15.00	$30.00-$65.00
CONGRESS (520 S. Michigan Ave.)	6.00- 12.50	9.00- 15.50	10.50- 16.00	17.50- 35.00
CONRAD HILTON (720 S. Michigan Ave.)	5.50- 13.00	10.00- 17.00	10.50- 22.00	20.00- 36.00
LA SALLE (La Salle at Madison Sts.)	6.50- 10.50	9.00- 13.00	12.50- 15.00	13.00- 35.00
PALMER HOUSE (State & Monroe Sts.)	5.00- 12.75	11.50- 16.25	12.05- 19.00	28.00- 34.50
SHERATON (505 N. Michigan Ave.)	6.85- 14.85	9.85- 16.85	11.85- 18.00	15.85 & Up

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed, to be occupied by ONE person. A double room contains a double (one) bed, to be occupied by TWO persons. A twin-bed room will NOT be assigned for occupancy by one person. A parlor suite consists of sitting-room and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the sitting-room.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating HOTEL (FIRST, SECOND AND THIRD CHOICE); number and type of room or rooms required; names and addresses of all persons who will occupy same; definite arrival date and whether such arrival will be during the day or evening; and probable date of departure.

Members who expect to arrive on early morning trains can avoid inconvenience of waiting for rooms by having reservations made for preceding evening and by paying for one additional day. Rooms reserved for morning arrival cannot be made available before midafternoon, unless voluntarily vacated by last occupant.

REGISTRATION FEE

REQUESTS FOR RESERVATIONS FOR HOTEL ACCOMMODATIONS SHOULD BE ACCOMPANIED BY PAYMENT OF THE REGISTRATION FEE IN THE AMOUNT OF $10.00 FOR EACH LAWYER. The Board of Governors solicits the cooperation of the members of the Association in thus facilitating the handling of the registration fee and in partially defraying the increasing expense of the Annual Meeting. In the event that it becomes necessary to cancel a hotel reservation, the registration fee will be refunded, PROVIDED NOTICE OF CANCELLATION IS RECEIVED AT CHICAGO HEADQUARTERS NOT LATER THAN JULY 26, 1954. ALL UNASSIGNED SPACE WILL BE RELEASED TO THE RESPECTIVE CHICAGO HOTELS, BY THE ASSOCIATION, ON JULY 26, 1954, AFTER WHICH DATE RESERVATIONS MAY BE MADE, BY INDIVIDUAL MEMBERS, WITH HOTELS DIRECTLY.

REQUESTS FOR RESERVATIONS, TOGETHER WITH $10.00 REGISTRATION FEE FOR EACH LAWYER FOR WHOM RESERVATION IS REQUESTED, SHOULD BE ADDRESSED TO THE RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION, 1140 North Dearborn St., Chicago 10, Illinois.

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

COMMERCE

Allocation of Part of the Cost of Improvements to Railroads Where the Railroads Receive No Benefit from the Improvements

■ *Atchison, Topeka and Santa Fe Railroad* v. *Public Utilities Commission of California, Southern Pacific Railroad* v. *Public Utilities Commission of California*, 346 U.S. 346, 98 L. ed. (Adv. p. 14), 74 S. Ct. 92, 22 U. S. Law Week 4005. (Nos. 22 and 43, decided November 9, 1953.)

The California Public Utilities Commission authorized the construction of grade separation improvements at two railroad crossings in Los Angeles and ordered the cost of the improvements to be divided equally between the railroads and the city. The railroads contended that the order was a taking of property without due process.

Mr. Justice MINTON, speaking for the Court, upheld the order, dismissing the argument that, since the railroads received little or no benefit from the improvements, both of which were ordered to eliminate bottlenecks in city traffic on the Los Angeles streets, they should not bear the cost. The opinion declared that, since the improvements were ordered to meet local transportation needs and enhance safety, all required by the rapid growth of the community, the Commission might allocate cost to the utilities without regard to benefits received, so long as the allocation was fair and reasonable. The Court distinguished the case from others where the "end purpose and result" of the improvements "is to enhance the value of the property by reason of the added facilities, where the costs assessed must bear some relationship to the benefits received". The Court also said that any interference with interstate commerce was incidental.

CHIEF JUSTICE WARREN took no part in the consideration or decision of the cases.

The cases were argued by Douglas F. Smith for the Atchison, Topeka and Santa Fe, by Burton Mason for the Southern Pacific, and by Hal F. Wiggins for the appellees.

Reviews in this issue by Rowland L. Young.

COMMERCE

Antitrust Laws Do Not Apply to Organized Baseball

■ *Toolson* v. *New York Yankees, Inc., Kowalski* v. *Chandler, Corbett* v. *Chandler*, 346 U.S. 356, 98 L. ed. (Adv. p. 20), 74 S. Ct. 78, 22 U.S. Law Week 4014. (Nos. 18, 23 and 25, decided November 9, 1953.)

In a decision that was given unusual publicity—on the sports pages rather than the front pages of most newspapers—the Supreme Court refused to overrule *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, 66 L. ed. 898, 42 S. Ct. 465 (1922). The Court's judgment, announced in a *per curiam* opinion in which seven of the Justices joined, left intact Mr. Justice Holmes' holding that the business of providing public baseball games for profit is not within the scope of the federal antitrust laws. The Court rested its judgment on the ground that Congress had not intended to include organized baseball within the scope of the antitrust laws, said to be shown by the fact that it had not undertaken to do so during the thirty-year period since the 1922 decision. The short opinion does not state that organized baseball is not interstate commerce, although the decision is so read by the dissenting Justices.

The dissenting opinion of Mr. Justice BURTON, in which Mr. Justice REED joined, cites the national character of organized baseball, its purchases of materials in interstate commerce, the attendance at games of audiences many of whom have travelled across state lines, its radio and television activities, and its farm system to support the view that the sport is interstate commerce. The dissent held that the 1922 decision had rested on a holding that the business of baseball was purely local and that the Court had "significantly refrained" from expressing its opinion on the issue whether the activities of organized baseball violated the Sherman Act, if they constituted interstate commerce.

The cases were argued by Howard L. Parke for Toolson, by Norman S. Sterry for the Yankees, by Frederic A. Johnson for Kowalski, by Raymond T. Jackson for Chandler, and by Seymour Martinson for Corbett.

COURTS

Suit in United States District Court in Kentucky Between Two Nonresidents of Kentucky

■ *Olberding* v. *Illinois Central Railroad*, 346 U.S. 338, 98 L. ed. (Adv. p. 7), 74 S. Ct. 83, 22 U.S. Law Week 4008. (No. 27, decided November 9, 1953.)

A Kentucky statute of the familiar kind making nonresident motorists amenable to suit in the state courts for accidents caused by negligent driving will not serve as the basis for a suit between an Illino.s corporation and a resident of Indiana in a federal court sitting in Kentucky.

Olberding collided with an overpass of the Illinois Central while driving his truck in Kentucky. The suit, based on diversity of citizenship, was brought in the federal district court in Kentucky, process being served upon Olberding through the Secretary of State in Frankfort, under

the Kentucky Nonresident Motorist Statute.

Mr. Justice FRANKFURTER, speaking for the Court, reasoned that the legal fiction that the nonresident motorist consents to be sued in the state courts by driving on the roads of the state is primarily designed to protect a resident injured party who might otherwise be without means of redress against the nonresident motorist. The Court said that 28 U.S.C. § 1391 (a), which confers diversity jurisdiction on the federal district courts, limits such suits to "the judicial district where all plaintiffs or all defendants reside". The Court refused to "move into the world of Alice in Wonderland" by holding that the defendant had actually agreed to be sued in Kentucky and thus had waived his federal venue rights under 28 U.S.C.

The Court distinguished *Neirbo Company* v. *Bethlehem Corporation*, 308 U. S. 165, 84 L. ed. 167, 60 S. Ct. 153, where a suit in the Southern District of New York was permitted against a Delaware corporation by a nonresident of New York. In the *Neirbo* case, it was said, the defendant had given actual consent because it had designated an agent in New York upon whom summons might be served.

Mr. Justice DOUGLAS concurred in the result.

Mr. Justice REED, joined by Mr. Justice MINTON, dissented. The dissenting opinion argued that the *Neirbo* decision was controlling since there was no substantial difference between the two cases.

The case was argued by William L. Mitchell for petitioners and by James G. Wheeler for respondent.

PERJURY

Failure To Aver Name of Person Who Administered Oath Is Not Fatal to Indictment for Perjury

■ *United States* v. *Debrow, United States* v. *Wilkinson, United States* v. *Brashier, United States* v. *Rogers, United States* v. *Jackson*, 346 U. S. 374, 98 L. ed. (Adv. p. 76), 74 S. Ct. 113, 22 U. S. Law Week 4019. (Nos. 51, 52, 53, 54 and 55, decided November 16, 1953.)

In these cases, the Court, speaking through MR. JUSTICE MINTON, reversed a lower court's dismissal of indictments for perjury because they did not allege the name of the person who administered the oath nor his authority to do so.

The indictments, which were for perjury before a Senate subcommittee, alleged that the subcommittee was a competent tribunal, pursuing matters properly before it, that in such proceedings it was authorized by law to administer oaths, and that each defendant duly took an oath before the committee and willfully testified falsely as to material facts. The Court said that the indictments set forth all the essential elements of perjury, and pointed out that the source of the requirement that an indictment for perjury must name the person who administered the oath, R. S. § 5396, 18 U.S.C. (1940 ed). § 558, had been expressly repealed by Congress in 1948.

Mr. Justice REED took no part in the consideration or decision of the cases.

The cases were argued by John F. Davis for the United States and by Ben F. Cameron for the respondents.

STATES

Motion To Enjoin Texas from Interfering with Contract Between Arkansas and Texas Corporation Continued

■ *Arkansas* v. *Texas*, 346 U.S. 368, 98 L. ed. (Adv. p. 71), 74 S. Ct. 109, 22 U. S. Law Week 4020. (No. —, Original, decided November 16, 1953.)

This was a motion for leave to file a complaint invoking the original jurisdiction of the Supreme Court. It was alleged that the University of Arkansas had entered into a contract with a Texas foundation whereby the foundation agreed to contribute $500,000 for the construction of a hospital in the Arkansas State Medical Center. The Attorney General of Texas had filed suit for an injunction in the Texas courts to prevent the foundation from performing the contract, on the ground that its funds must be expended for the benefit of Texas residents.

The Court was faced with the question whether Texas was unlawfully interfering with Arkansas' contract, so that there was a controversy between two states which would invoke the original jurisdiction of the Court under Article III, Section 2 of the Constitution. Mr. Justice DOUGLAS, speaking for the Court, held that the University, as an official agency of the state, could stand in the shoes of the state and that the case was an "appropriate one" for the exercise of the Court's original jurisdiction.

The question whether the foundation had authority to give funds to the university being a matter of Texas law, the Court continued the motion until the Texas litigation was finished.

Mr. Justice JACKSON, joined by Mr. Justice FRANKFURTER, Mr. Justice CLARK and Mr. Justice MINTON, dissented, arguing that the only question was one of Texas law, which could be settled only by Texas.

The case was argued by Thomas J. Gentry and E. J. Ball for the complainants, and by Marietta McGregor Creel and William H. Holloway for the defendants.

WORKMEN'S COMPENSATION

Award of Compensation in Spite of Absence of Written Notice Required by Statute

■ *Voris* v. *Eikel*, 346 U.S. 328, 98 L. ed. (Adv. p. 3), 74 S. Ct. 88, 22 U. S. Law Week 4012. (No. 20, decided November 9, 1953.)

This case involved interpretation of Section 12 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended.

The claimant longshoreman received permanent injuries in a flash fire aboard a ship on which he was working. He was taken home by his foreman who reported the injuries to the timekeeper. No written notice of the claim for compensation was given.

The Supreme Court, in the first

opinion written by CHIEF JUSTICE WARREN, unanimously upheld an award by the Deputy Commissioner, despite the fact that no written notice had been given as required by Section 12 of the statute and the fact that the employer's representative on the job was not informed of the accident. The Court said it was construing the Act liberally in conformance with its purposes in holding that the employer had sufficient notice of the injuries to justify the Deputy Commissioner in making the award.

The case was argued by Murray L. Schwartz for the petitioner, and by John R. Brown for the respondent.

Courts, Departments and Agencies

George Rossman • EDITOR-IN-CHARGE Richard B. Allen • ASSISTANT

Antitrust Law . . . investment bankers case.

■ In a monumental 424-page decision Judge Harold R. Medina, of the United States District Court for the Southern District of New York, has ruled that the syndicate system used by investment bankers in the marketing of securities is not a per se violation of the Sherman Act and has dismissed the case which was commenced by the Department of Justice on October 30, 1947.

Quite apart from any judgment as to the outcome of the so-called "investment bankers case", the opinion is refreshing reading and constitutes a formidable textbook on investment banking operations in the United States. There is a minimum of law in the opinion as Judge Medina concentrated on describing in detail the investment business. He placed great reliance on *Board of Trade of Chicago* v. *U. S.*, 246 U. S. 231, from which lengthy quotations are taken. He stated: "I can find nothing in any of these cases which would permit me to conclude that the rule of reason has been abandoned or discarded. . . . Despite all the general condemnation of price-fixing, I find nothing in any of these cases which can be regarded as controlling precedent here or which binds me to hold the clauses of these syndicate agreements now under attack to be illegal per se under the Sherman Act."

The Court noted that the case highlighted a "head-on" collision between the Securities and Exchange Commission and the Antitrust Division of the Department of Justice, and in connection with this observation he cited and discussed the SEC ruling in *National Association of Securities Dealers, Inc.* (Exchange Act Release No. 3700, June 13, 1945), in which the Department had intervened to attack various clauses in the agreements with respect to a bond issue as per se violations of the Sherman Act. This intervention, the Court said, "fell like a bombshell on the investment banking industry", but the SEC upheld the validity of the clauses in question, and Judge Medina agrees with the Commission's conclusions.

The case and the decision are of major importance in the field of antitrust law. A prodigious amount of time and energy of countless persons went into the proceedings. The trial began in November of 1950 and ended after 309 courtroom days in May of 1953. The transcript contains between 5,000,000 and 6,000,000 words and the Court had to read approximately 105,000 pages of material. Small wonder that the opinion requires 424 printed pages. Incidentally, the Record Press, 214 William Street, New York City 38, has copies of the opinion available at $8.00.

(*U.S.* v. *Morgan et al.*, U.S. D.C. S.D. N.Y., October 14, 1953, Medina, J.)

Contempt . . . what constitutes.

■ The contempt of court convictions of an attorney and two clients who were moving figures in the filing of a petition requesting the appointment of a special prosecutor for a pending criminal case have been reversed by the Supreme Court of Illinois.

The petition, circulated under the auspices of a good-government group and bearing 586 signatures, urged the trial judge to name a special prosecutor to direct a criminal case against a justice of the peace who was under indictment for embezzlement. The regular prosecuting attorney had previously written a letter to the judge requesting that he be allowed to withdraw from the case, but the judge had refused to permit him to do so. The petition also alleged that the prosecuting attorney had been derelict in handling the case.

At a hearing on the petition, the trial judge not only relieved the prosecuting attorney but also entered a rule against the petition signers to show cause why they should not be adjudged in contempt of court on the grounds that the petition was altered, that it contained odious and defamatory language and that it misquoted the prosecuting attor-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

ney's letter. Two of the petition signers and the attorney who prepared the petition were subsequently convicted of contempt.

In reversing, the Court held that the fact that identical introductory pages from the various petitions were removed before the document was filed did not render the petition in its final form an altered instrument, since it appeared that this was done simply for brevity. Whatever change was effected was in form only, the Court said, and was not material or fraudulent. The charge that the petition contained odious and defamatory language was abandoned on appeal and the Court found little merit in the contention that the petition misquoted the letter, since the judge had the original letter in his possession at all times and could not possibly have been misled or deceived.

Although they did not originally form any basis for the judge's contempt citation, contentions of the judge that the good government group was attempting to "pressurize" him and that the petition signers did not have a legal right to request appointment of a special prosecutor were rejected. Also receiving short shrift from the Court were constitutional arguments of the petitioners that they were denied the right to petition for redress of grievances and that the judge's procedure in the contempt hearing denied them due process.

(*People* v. *Howarth et al.*, Sup. Ct. Ill., September 24, 1953, Hershey, J. 114 N.E. 2d 785.)

Corporations . . . charitable donations not *ultra vires*.

■ The Supreme Court of New Jersey has held that under modern conditions and even apart from statutory provisions a corporation is not acting *ultra vires* in making a reasonable charitable contribution from corporate funds. In so doing the Court denied the contentions of a group of stockholders that a corporate gift of $1,500 to Princeton University was not authorized either by the corporation's charter or by statute.

New Jersey statutes authorize (as do laws in twenty-nine other states) a corporate charitable contribution, but the objecting stockholders had argued in the instant case that the statutes were inapplicable since they were enacted after the corporation involved in the case was created. But the Court ruled that, in an instance justified by advancement of the public interest, the reserved power of the state to alter a corporate charter may be invoked to sustain later alterations even though contractual rights between the corporation and its stockholders and among the stockholders themselves are affected.

The Court declared that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members" of the community, and continued: "But even if we confine ourselves to the terms of the common-law rule in its application to current conditions, such expenditures may likewise be readily justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system."

(*A. P. Smith Mfg. Co.* v. *Barlow et al.*, Sup.Ct. N.J., June 25, 1953, Jacobs, J., 98 A. 2d 581.)

Criminal Law . . . showing required for change of venue.

■ The Supreme Court of Florida has held that a trial court properly refused to admit the results of an opinion poll prepared by a professional poll-taking organization purporting to show that a Negro defendant could not secure a fair rape trial in the county in which the trial was held.

The questions used in the poll were prepared in New York and were propounded to selected numbers of white and Negro persons in the county where the crime occurred, in the county where the trial was held (there already having been one change of venue) and two other counties. While the opinion does not make clear the results of the poll, it is implicit that they tended to show a public opinion that the defendant could not have a fair trial.

All this was unconvincing to the Court. The Court said that there was a vast difference between the results of a public-opinion poll and a demonstration to the court of some overpowering sentiment that would preclude the finding of twelve persons who could take a juror's oath to decide the case upon legal evidence. The Court ruled, moreover, that the witness who offered the results of the poll was testifying only to hearsay since he had not been one of the interviewers but merely had compiled the results. Any opinion he could have given, the Court observed, would have been "hearsay based upon hearsay". A survey, the Court continued, might well indicate the attitutde of consumers toward commercial products, but "as it was conducted and attempted to be applied here, it was useless".

(*Irvin* v. *State*, Sup. Ct. Fla., June 23, 1953, rehearing denied July 27, 1953, Thomas, J., 66 S. 2d 288.)

Criminal Law . . . what immunity attaches to presence in state under waiver of extradition.

■ The Supreme Court of Minnesota has been called upon to make a first-impression interpretation of one of the provisions of the Uniform Criminal Extradition Act, now in force in thirty-four states.

A Texas resident had waived extradition and appeared in a Minnesota court to answer a criminal charge of violation of the state's blue-sky law. He entered a plea of guilty at 10 A.M. but sentencing was deferred until 3 P.M. At 1:30 he was served with civil process in a suit based upon the same transaction as the criminal action.

The Uniform Criminal Extradition Act provides that when a person is in a state by extradition or waiver thereof, he is not subject to civil process in a case arising from the same facts "until he has been convicted in the criminal proceeding, or, if acquitted, until he has had

reaonable opportunity to return to the state from which he was extradited". The defendant argued that he had not been "convicted" within the meaning of this statute until sentence was imposed and that therefore he was immune to civil process before sentencing.

But the Court adhered to the majority rule that the term "conviction" should be given its ordinary and popular legal meaning as referring to a verdict, finding or plea of guilty—an event independent of the act of sentencing. To bolster its conclusion on this point, the Court cited the American Law Institute's Model Code of Criminal Procedure which states that "conviction" means "the final acceptance of a plea of guilty or the finding by the jury or by the court that the defendant is guilty". The same result would have been reached under Minnesota common law.

(*Bubar* v. *Dizdar et al.*, Sup. Ct. Minn., July 17, 1953, rehearing denied September 23, 1953, Dell, C. J., 60 N.W. 2d 77.)

Customs . . . obscene books.

■ In a proceeding in which two books were confiscated by customs officials at the port of entry on the ground that they were obscene under 19 U.S.C.A. §1305 (a), the Court of Appeals for the Ninth Circuit has adhered to the general test it laid down in *Burstein* v. *U.S.*, 178 F. 2d 665, that a book is obscene when it is "dirt for dirt's sake".

The books involved were *Tropic of Cancer* and *Tropic of Capricorn* and the Court had little difficulty in finding them heavily larded with obscenity. The claimant of the volumes, however, argued that they had literary merit because they truthfully described the present base status of society and that therefore, since this is an age of realism, obscene language depicting obscenity in action ceased to be obscenity. But the Court had little patience with this contention. "It is no legitimate argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency", the Court declared.

The Court conceded that under the statute a book must be judged as an integrated whole, and that "literary merit" must be recognized, but it further said that if an incident, integrated with the theme or story of the book, "is word-painted in such lurid and smutty or pornographic language that dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene".

(*Besig* v. *U.S.*, C.A. 9th, October 23, 1953, Stephens, J.)

Damages . . . when excessive.

■ In two recent cases the Supreme Court of Washington has been asked unsuccessfully to find that damage awards made by juries were excessive.

In one case—a wrongful death action—there was a verdict of $50,000 for the benefit of a husband and minor child for the death of the wife-mother. The Court conceded that "no phase of the law of damages is in such an unsatisfactory state as that concerned with the rule governing damages for wrongful death". Washington has no statutory limit on the amount recoverable for wrongful death, and the Court declared that, in the absence of passion and prejudice in the trial, an appellate court should be reluctant to interfere with the jury's determination, since the jury is given considerable latitude in the awarding of damages. The verdict must be compensatory of a pecuniary loss, the Court said, but not out of proportion to actual damages. The Court quoted with approval the sentiments of Chancellor Kent expressed in 1812 in *Coleman* v. *Southwick*, 9 Johns. (N. Y.) 45, that to warrant reduction by an appellate court damages "must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous. . . ."

In the second case, the Court refused to disturb an award of $11,410.58 in a civil assault and battery suit in which the plaintiff was remarkably battered.

(*Kramer* v. *Portland-Seattle Auto Freight, Inc. et al.*; *Kagele* v. *Frederick et al.*, Sup. Ct. Wash., October 1 and 2, 1953, Weaver, J., 261 P. 2d 692 and 699.)

Insurance Law . . . estoppel to claim no coverage.

■ An insurance company is estopped from asserting that it has no obligation to defend its insured by undertaking to defend the action by the filing of an answer, the Court of Appeals for the Eighth Circuit has held.

The case involved defense of an automobile accident suit and the company was attempting to escape the obligation of defending the suit on the ground that it had not been notified of the death of the insured within sixty days after the death under an assignment clause in the policy which provided coverage would be extended if notification were given. The accident occurred after expiration of the sixty-day period and the company, after the filing of the damage suit, wrote the defendants that it would assume defense of the action with the understanding that it was not waiving any of its rights. The defendants replied that they would not enter into such an understanding and thereafter the company filed an answer on behalf of the defendants.

In denying an action for a declaratory judgment, the Court held that since the company had undertaken defense of the damage suit with knowledge of all the existing facts it had abandoned its position that there was no coverage under the policy and that it was estopped from asserting that defense.

(*Schmidt et al.* v. *National Automobile & Casualty Ins. Co.*, C.A. 8th, October 23, 1953, Gardner, J.)

Labor Law . . . time-study by union.

■ The obligation of an employer under the National Labor Relations Act to bargain collectively in good

faith does not require it to open its plant to a union for the purpose of making a time-study relating to new production standards, the Court of Appeals for the Second Circuit has ruled, with one judge dissenting.

The contract between the union, which was the certified bargaining agent, and the employer provided that each job was to be rated in terms of units and employees were paid incentive premiums for production over the basic work unit as established by time-studies. When a new machine was installed in September of 1950, a new production standard was established in accordance with the contract, but the union lodged a grievance on the ground the standard work unit was too high. It requested either the employer's time-study data or permission to make its own time-study.

The union conceded that the employer, under the contract, had the exclusive right to establish standards in the first instance, but it insisted that it could not intelligently evaluate and present its grievance unless it could enter the plant to make its own time-study.

The Court affirmed the part of the National Labor Relations Board's order requiring that the employer furnish its data to the union, but denied that part making provisions for union time-studies in the plant. As to whether the production standard set was too high, the Court remarked that the union already had that knowledge as acquired by its members who had worked the machine.

(*NLRB* v. *Otis Elevator Company*, C.A. 2d, November 10, 1953, per curiam.)

Municipal Corporations . . . removal of snow and ice from sidewalks.

■ Damage suits resulting from New York City's record blizzard of December 26-27, 1947, are still in that state's appellate court system. In the latest the Appellate Division, First Department, has sustained a judgment against the City obtained by a pedestrian who fell on a sidewalk some 135 hours after cessation of the snowfall.

In *Yonki* v. *City of New York*, 276 App. Div. 407, the accident occurred sixty hours after the storm and there was no liability. Likewise there was no liability in *Rapoport* v. *City of New York*, 281 App. Div. 33 (digested in 39 A.B.A.J. 235; March, 1953), where there was a lapse of ninety hours. But the time-element difference between those cases and the present case, while forceful, was not the only factor upon which the Court relied in holding the City liable in the instant case.

The City contended that since a freezing rain was falling on the day of the accident it was not clear whether the accident was caused by the accumulated snow or the new-forming ice. The Court was not convinced that the freezing rain caused the accident but declared that even if it did contribute to the hazard, the accumulated snow was a concurrent cause, but for which the accident would not have happened.

Two judges, dissenting, thought that the City could not reasonably have been expected to have had all sidewalks cleared by the time this accident happened, and that, moreover, the plaintiff had not proved precisely that the accident was caused by the accumulated snow rather than the new ice.

(*Smith* v. *City of New York*, N.Y. Sup. Ct. App. Div., 1st Dept., October 27, 1953, per curiam.)

Municipal Law . . . disclosure of investigative report.

■ A final report made to the Mayor of New York City by the Commissioner of Investigation is open for inspection by any taxpayer, the New York Supreme Court's Appellate Division, First Department, has ruled. The report as to which disclosure was sought concerned an investigation into charges of maladministration of the City's penal institutions on the part of the Commissioner of Correction.

The New York City Charter provides that there shall be no public scrutiny of "papers prepared . . . by or for counsel for use in actions or proceedings to which the City or any agency is a party or for use in any investigation authorized by this charter". The Court held that a final and formal report of the Commissioner of Investigation was not a paper for use in an investigation, and that therefore the broad policy of disclosure applied. The Court declared that there were "obvious distinctions between papers for use in an investigation and a culminating official report at the conclusion of the investigation".

One judge dissented on the ground that the Charter provision applied to enforce nondisclosure, and that, moreover, the internal administration of the City would be harmed by disclosures of all so-called final reports. He favored leaving the decision to the Mayor, to be exercised "at his political peril".

(*Cherkis* v. *Impellitteri*, N.Y. Sup. Ct. App. Div., 1st Dept., October 6, 1953, per curiam.)

Negligence . . . contributory negligence of infant.

■ With two judges dissenting, the Supreme Court of New Jersey has refused to adopt the rule requiring a conclusive presumption against negligence by children under certain ages. The doctrine is often referred to as the Illinois rule, in which state a child under seven is conclusively presumed to be incapable of negligence.

The Court declared that a conclusive presumption of nonnegligence was not the law of New Jersey, but did not specifically spell out the existence of the rebuttable presumption theory, which is sometimes called the Massachusetts rule, although the instant case was remanded with a direction to submit the question of contributory negligence of the child—five and one-half—to the jury. "If reasonable men might differ as to the capabilities of an infant to understand, appreciate and avoid dangers to which he is exposed", the Court said, "then whether or not he was guilty of

contributory negligence in the circumstances becomes a jury question."

The Court declared that age should not be the sole criterion in determining whether an infant should be chargeable with contributory negligence. Most children, the Court asserted, have some grasp of any situation, and although a child may be too young to be contributorily negligent, the age comes when it is a question of fact to be determined from the capabilities of the child and the situation involved.

(*Dillman* v. *Mitchell*, Sup.Ct. N.J., October 26, 1953, Oliphant, J.)

Negligence . . . inference of negligence.

■ To sustain an action either in tort or for breach of warranty based on an allegation that food was contaminated, the plaintiff must prove by more than mere conjecture or speculation that the defendant's food product was in fact contaminated and caused the damage for which suit is brought, according to the Appellate Court of Illinois, First District.

The plaintiffs—an entire family—had eaten some chitterlings prepared and packaged by the defendant and which had been cooked for some time before consumption. Beginning about three days later the family started going to the hospital—all with bacillary dysentery, Shigella Flexner type. The medical evidence, however, was rather unsatisfactory from the plaintiffs' viewpoint. Even their own bacteriologist said that it was only possible, and not probable, that the illnesses were connected with the consumption of the chitterlings.

The Court felt that there had not been enough causal evidence to invite use of the inference-of-negligence doctrine and held that the case should not have been allowed to go to the jury. It is not enough, the Court observed, to show a state of facts simply consistent with the plaintiff's theory, but which also suggests or leaves fully as reasonable an inference of no negligence.

(*Shaw et al.* v. *Swift & Co.*, App. Ct. Ill., 1st Dist., June 8, 1953, Friend, J., 114 N.E. 2d 330.)

Public Records . . . parole board records confidential.

■ In a case tingling with political overtones the New York Supreme Court for Albany County, a few days before the recent New York City mayoralty election, held that correspondence and other memoranda communicated to the state's Board of Parole in regard to a parole hearing are not available for public inspection.

During the mayoralty campaign, Robert F. Wagner, Jr., who became the winning candidate, charged that "one of Governor Dewey's closest political associates . . . a national figure whose every word or action carries tremendous weight throughout the country" had sought to obtain the release of Joseph S. Fay, who was serving a sentence for extortion and whose release on parole had been turned down in February of 1953. The instant action, brought on behalf of Mr. Wagner, was in the nature of mandamus and sought to compel the Board to make public all communications in the Fay hearing or a list of all persons, other than physicians and clergymen, who had intervened with the Board on Fay's behalf.

The petitioner admitted that under an applicable statute the Board had properly adopted rules making the records of all persons on parole secret. It was argued, however, that there was a distinction between those records and preparole records. But the Court rejected this contention and said that if preparole records were public, then the provisions for secrecy of the records of one admitted to parole would be meaningless, since such records would already be public.

The petitioner's most earnest contention was that if the records sought were confidential, there should be an exception made in this case because of the public interest involved. But the Court thought this was confusing public curiosity with public interest. "The public interest is far better served by the preservation of a sound and well established parole system", the Court declared.

The Court observed that the principle of secrecy of documents submitted in parole hearings was one of long standing and was essential to an impartial and intelligent parole system. In the Court's judgment the entire penal and parole system would be jeopardized by violating the principle. In one of the rare uses of exclamation points in judicial decisions, the Court said: "Surely the exigencies of a political campaign do not justify such a result! Surely courts should not become involved in political conflicts nor lend their aid to either one side or the other in a political controversy!"

(*Jordan* v. *Loos et al.*, N.Y.S.C., Albany Co., October 29, 1953, Bookstein, J.)

Taxation . . . interest as a deduction in computing adjusted gross income.

■ The Court of Appeals for the Fifth Circuit has ruled that a taxpayer cannot deduct from gross income in determining adjusted gross income an amount paid as interest on indebtedness secured by a mortgage on rental property unless he can show that the proceeds of the loan were used in connection with the mortgaged property or with production of income therefrom.

There was of course no question that the interest would have been a proper page-three deduction but the taxpayer had figured his tax from the page-four table and had also deducted the interest in arriving at his gross rental income. By doing this, the Government claimed, he had increased the deduction to which he was entitled. The taxpayer was unable to show that the proceeds of the loan had been used in connection with the income-producing property which bore the mortage, but he insisted that the interest was "attributable to property held for the production of rents" [I.R.C. §22 (n) (4)] because if he failed to pay the interest the mortgage would be foreclosed and the property lost.

But the Court disagreed and held that the proper test was whether the taxpayer's indebtedness was incurred or the proceeds of the loan used in the connection with the rental-producing property. To hold otherwise, the Court declared, would open the way for the taxpayer "to increase his interest deduction by securing any indebtedness with a mortgage on rental property".

(*U.S.* v. *Wharton*, C.A. 5th, November 4, 1953, Rives, J.)

Taxation . . . what is taxable alimony?

■ Life insurance premiums paid by a divorced husband under a separation agreement incident to the divorce are not taxable income to the divorced wife, the Court of Appeals for the Seventh Circuit has decided, where under the agreement the wife could share in the insurance proceeds only if she survived the husband.

The parties were divorced in 1932, and under the separation agreement the husband deposited two ordinary life insurance policies with a trustee and agreed to maintain them in force. Although the agreement was quite detailed with respect to distribution of the insurance proceeds on the husband's death, the wife had to survive to share, and in the event of her remarriage her share was curtailed.

The Commissioner contended that the amount of premiums paid each year constituted a "periodic payment" of alimony taxable to the wife as income under I.R.C. §22 (k), but the Court declared that "it was a matter of rank speculation or conjecture" as to whether the wife "would ever realize any economic gain". The Court emphasized that the taxpayer received no cash, either actually or constructively, no property capable of ascertainment, and that even the increased cash surrender value of the policies meant nothing to the wife since her right to receive any value from the policies was contingent.

The fact that the Tax Court had previously ruled that the premiums were deductible by the husband under I.R.C. §23 (u) was deemed not controlling.

(*Seligmann* v. *Commissioner*, C.A. 7th, October 19, 1953, Major, C.J.)

Workmen's Compensation . . . pre-existing disease or infirmity.

■ In a workmen's compensation death benefit case, the Supreme Court of Mississippi has decided that an award may be made where the decedent, who had high blood pressure, was required in her employment to bend over and her death occurred as a result of a "massive cerebrovascular accident" or ruptured blood vessel on the brain.

The employee was a tung nut gatherer. Since nuts were picked up from the ground, the employees had to stoop or bend over continually to retrieve them. The work was "piece work" but normally the employees worked eight hours a day.

The claimant's doctor testified that stooping over was one of the worst things a person with high blood pressure could do, since a rush of blood to the head resulted. He said that stooping over caused the employee's death. The employer's doctor declared that death could come to a person with high blood pressure at any time, although he admitted stooping over might increase the danger.

The Court reaffirmed that under workmen's compensation a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated or combined with the disease or infirmity to produce the injury or death. The Court thought the claimant's evidence was clear and that the testimony of the employer's doctor that death could have occurred at any time did not substantially contradict the claimant's case.

(*Cowart* v. *Pearl River Tung Co. et. al.*, Sup. Ct. Miss., October 19, 1953, McGehee, C.J., 67 S. 2d 356.)

Further Proceedings in Cases Previously Reported in This Division

■ On November 9, 1953, the Supreme Court of the United States:

DENIED CERTIORARI in *Western Union Telegraph Company* v. *New Jersey*, 97 A. 2d 480 (digested in 39 A.B.A.J. 828; September, 1953), leaving in effect a decision of the Supreme Court of New Jersey affirming a conviction of Western Union and one of its office managers for the maintenance of a common law disorderly house based upon the volume of telegraphic traffic relating to horse-race betting handled at one of its offices.

Affirmed the decision of the Court of Appeals for the Sixth Circuit in *Kowalski* v. *Chandler* and *Corbett* v. *Chandler*, 202 F. 2d 413 and 428 (digested in 39 A.B.A.J. 595; July, 1953), that organized baseball is not engaged in trade or commerce within the meaning of the antitrust laws, thus refusing to deviate from the Supreme Court's 1922 ruling in *Federal Baseball Club* v. *National League of Professional Baseball Clubs*, 259 U. S. 200. Consolidated with the *Kowalski* and *Corbett* cases, and also affirmed, was *Toolson* v. *New York Yankees*, 200 F. 2d 198. [For a review of the Supreme Court's decision, see page 55 of this issue.]

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The following article by Messrs. Stahl and Deasy is presented not only because of the intrinsic importance of the subject matter but also because it reveals something of the problems and responsibilities of draftsmen seeking to perform a public service in a highly significant field.

A Housing Code Is Drafted for Pittsburgh

by David Stahl and John A. Deasy, Jr.,
Members of the Bar of Allegheny County, Pennsylvania

■ A major postwar challenge to American cities has been the rehabilitation of substandard housing. Armed with strong legislative authority, including the power of eminent domain, a number of cities succeeded in eliminating areas of extreme blight through slum clearance and land redevelopment programs. When these extensive and often spectacular projects had been completed, however, there still remained large urban areas, usually the older sections of the cities, which were not wholly blighted but which were ripe for deterioration and decay. With many cities bursting at their boundaries due to the growth of population, it has become important to save the established residential districts from potential blight. Urban conservation—the revitalization of residential dwellings long neglected by their owners as well as by municipal officials—is now one of the principal aims of civic planners.

This pattern is typical of Pittsburgh. Urban redevelopment has become a maxim in the great steel metropolis, and large areas of the city have undergone a complete face lifting with the erection of modern office buildings and the construction of public housing projects. Virtually untouched by these major improvements are many of the residential sections of the city. The 1950 United States census report indicated the extent of deterioration of the city's housing. Of the 192,000 dwelling units in the city, some 63,000 or approximately 33 per cent, were found to be substandard. Housing experts and civic leaders realized that while many citizens were doing their best to improve their property, there was an unquestioned need for a positive enforcement program and for clarification of the responsibility of property owners and tenants for eliminating substandard housing conditions. A comprehensive housing code, which would establish basic housing standards and vest administration of the code in one city agency, was considered essential to stop further spread of blight and to conserve residential areas which had not yet shown signs of deterioration. A further impetus to housing rehabilitation in Pittsburgh and in other cities is provided by a requirement of the Federal Government that municipalities must have approved housing rehabilitation programs before they may be eligible for federal grants for redevelopment purposes.

In January, 1953, the Mayor of Pittsburgh requested the Public Health Law Research Project of the University of Pittsburgh School of Law to undertake the preparation of a modern housing code which the city could utilize as the basis for a new housing ordinance. The Public Health Law Research Project, which operates under a grant from the A. W. Mellon Educational and Charitable Trust of Pittsburgh has done considerable research in public health law and has prepared proposals for modern legislation in various fields of public health, some of which have been utilized by the Pennsylvania legislature. See 36 A.B.A.J. 489 (1950) for a discussion of the project.

The initial task of the project was to determine the legal authority of the city under state law to adopt a housing code and to carry out a housing rehabilitation program. A study of the legislation relating to housing emphasized the need for modernization of the city's housing laws. The latest housing statutes enacted by the Pennsylvania General Assembly for cities of the second class (Pittsburgh and formerly Scranton), were the Tenement House Sanitation Act and the Tenement House Safety Act, both of 1903 vintage. These acts established sanitary standards and structural regulations for tenement houses, which were defined as buildings occupied by three or more families living in separate apartments. The latest comprehensive city housing ordinance was the Tenement House Ordinance of 1911, which supplemented the earlier State Tenement House Laws. The 1911 ordinance extends its regulation to all types of dwellings, but its substantive standards are not up to date and the ordinance generally lacks the machinery for effective administration and enforcement.

The city's authority to adopt a housing code is clear. This authority is predicated on a number of state laws—an early 1895 law setting forth the city's basic health powers, the 1901 City Charter Act, a 1911 statute authorizing the city to vacate or demolish dwellings dangerous to health, and a general enabling statute of 1937 applicable to most Pennsylvania municipalities.

After the preliminary research into existing legislation had been completed, a review committee was formed to act in an advisory capacity to the project. The committee was made up of interested civic leaders including representatives of real estate and building groups, several members of Pittsburgh's City Council, officials of the City Depart-

ments of Public Health, Public Safety, Planning and Law, representatives of the Pittsburgh Housing Association, the Pittsburgh Urban Redevelopment Authority, and the Pittsburgh Housing Authority, and members of the staff of the University of Pittsburgh's Graduate School of Public Health and Institute of Local Government.

The full committee conducted a detailed review of each preliminary draft of the Housing Code prepared by the project. The exchange of views among municipal officials, real estate men, builders, civic planners, housing experts and drafters was extremely profitable in fixing housing standards and in developing the techniques of administration and enforcement adopted in the Code. Where disagreement arose in full committee meetings, or where particular problems required further study, subcommittees were appointed and reported back their findings at a later time.

Drafts of the code were also reviewed by housing experts of the United States Public Health Service and the Federal Housing and Home Finance Agency.

Before commencing the actual draft of a housing code, the members of the project staff surveyed the housing laws of other cities and states as well as the Proposed Housing Ordinance issued by the American Public Health Association in 1952. The A.P.H.A. ordinance is a significant contribution toward the development of modern municipal housing legislation. The proposed ordinance was prepared by a group of outstanding health officers and public health experts with the aid of a legal staff. A former member of the project staff participated in the final deliberations of the association's subcommittee which drafted the suggested ordinance.

The American Public Health Association has emphasized that its proposed housing ordinance is not "model" legislation but is rather a guide for local housing laws, to be adapted to local housing conditions and to local needs. The project staff utilized the A.P.H.A. ordinance in precisely this fashion. Using the substantive standards and enforcement procedures recommended in the A.P.H.A. ordinance as a point of departure, the drafting group developed a housing code within the framework of Pennsylvania law, municipal administrative practices and local housing conditions.

A major portion of the Housing Code drafted by the Public Health Law Research Project is devoted to the establishment of minimum sanitation and safety standards. The final product is primarily a performance rather than a specifications code, although in a few instances the means of achieving the standards are set forth in detail. Most of the details of compliance with the code standards are to be supplied by the regulations which the administrator is authorized to issue to implement the code.

Ideally, a housing code should fix the strictest standards of sanitation and safety which public health and safety experts believe to be desirable for the protection of the public. However, even in model legislation it is necessary to determine just how much "protection" a community will accept. The most beneficent legislation will fail to bring about the desired result if there is a lack of popular consent to the law. The inability to enforce unacceptable regulation, as in the case of the prohibition experiment, only serves to breed disrespect for enforcement.

With this practical limitation in mind, the drafting group and its advisers reviewed the results of a housing survey of approximately 40,000 dwelling units in Pittsburgh. The survey showed a significant lack of private toilet and bathing facilities, overcrowding, deficiencies in ventilation and availability of natural light and insufficient means of egress in upper stories of dwellings. The housing code attempts to eliminate these deficiencies which constitute direct hazards to health and safety. Beyond that the code seeks to prevent the potential causes of deterioration and blight. In hammering out the minimum standards for the various phases of the construction, maintenance and occupancy of dwellings, as for example, floor area, window area, room occupancy, availability of utilities and other services, and sharing of toilet facilities, the drafting group and its advisers took into consideration the number of dwelling units in the city that would need extensive alteration to comply with higher standards, the cost of making the alterations, and the standards of other agencies also engaged in the supervision of housing such as the Federal Housing Administration and the Public Housing Administration.

In order to acquaint those responsible for compliance with the code of the standards established in the code, and in order to allow time for the making of any repairs or alterations necessary to meet the code standards, the proposed legislation would not go into effect until six months after the date of enactment.

Among the most important features of the proposed housing code are the provisions for administration and enforcement. The proper agency to administer a housing rehabilitation program will usually be determined by the political structure of the municipal subdivision adopting a housing law. Many proponents of effective municipal housing rehabilitation programs believe that an entirely separate agency should be established to administer a housing code. On the other hand, there are those who believe that the housing program belongs in one of the existing departments of city government, such as the department of public health or the department of public safety, which is already administering existing housing sanitation or safety laws. Often an important factor in determining the proper administrative agency is the condition of the municipal budget which may preclude the creation of a new department of city government. Also, the limited authority of the municipal charter may prevent the creation of a new department

unless an express enabling law is passed.

In the Housing Code drafted by the project, administration is vested in the health department. Since the Code authorizes the director of the health department to delegate his powers, it is expected that the bureau or division concerned with sanitary engineering or environmental sanitation will actually administer the program, or else that a new bureau or division will be created to enforce the housing code.

Because the rehabilitation of housing in any city requires more than a good law and a willing administrator, the proposed housing code establishes a housing co-ordinating committee, consisting of the heads of the municipal departments of public health, public safety, city planning, and law, representatives of independent redevelopment and public housing authorities, and several public members, to act in an advisory capacity to the administrator. The principal function of the co-ordinating committee is to promote co-operation among the various departments of the city government which are in any way involved in the regulation of dwellings.

The successful administration of a housing code depends primarily upon effective enforcement. State and municipal housing laws have in the past merely provided penalties for violations of the standards set up in those laws, with no positive machinery for enforcement. In drawing the housing code for Pittsburgh, the drafting group followed the procedure proposed by the American Public Health Association's Housing Ordinance of providing for complete administrative hearings and review before resorting to court action. The Pittsburgh group believed that the exhaustive administrative procedure in the code would result in an amicable solution to the vast majority of housing complaints and violations and leave only a handful of cases for the courts.

The aim of the housing code is to obtain compliance rather than impose punishment. The code provides that when the administrator of the program believes that a violation of the code has occurred, or if he believes that a dwelling is unfit for human habitation and should be vacated or (in rare instances) demolished, he is required to give notice to the person responsible for compliance with the code. The alleged violator is generally afforded the opportunity to correct the defective condition.

Any person aggrieved by a notice may appeal to a hearing board established by the code. The hearing board consists of one officer of the health department, one officer of the department of public safety, and one public member. Failure to appeal to the hearing board, or affirmance of the administrator's action by the hearing board, changes the notice into an order and requires prompt compliance by the person to whom the notice was issued. If there is a failure to obey the order, the administrator may then resort to court action.

Another feature of the proposed housing code intended to promote effective enforcement is the delineation of responsibility between owners and tenants for compliance with the various substantive requirements of the code. Landlords, tenants and administrators alike will benefit from knowing exactly who is responsible for each phase of the housing rehabilitation program.

After a review of the final draft by the full review committee, the proposed housing code was presented to the Mayor of Pittsburgh. The Mayor declared that the presentation of the proposed housing code marked the inauguration of the "Pittsburgh Plan" for the elimination of substandard housing. He announced his intention of creating a large citizens' committee to review the recommendations in the suggested code before a proposed new housing ordinance is presented to the City Council. A number of municipalities surrounding Pittsburgh have also expressed interest in the proposed housing code.

The experience of the project staff in drafting the code demonstrates the importance of co-operation between lawyers and specialists in government, science and other fields in writing social legislation. It also points up the key role of the lawyer in integrating the ideas of the technical experts in the particular area of legislation and in presenting the final product in clear and precise statutory language.

Activities of Sections and Committees

SECTION OF ANTITRUST LAW

■ The Spring Meeting of the Antitrust Section will be held in Washington, D. C., on April 1, 1954.

A symposium has been designed to provide general practitioners with practical advice on how to try an antitrust case. The large number of clients who become involved in proceedings by the Department of Justice or Federal Trade Commission or in private treble-damage suits makes a knowledge of antitrust procedure almost indispensable to most lawyers.

The tentative schedule has attorneys of the Department of Justice providing a "hornbook" treatment of each step in a proceeding brought by that department. It will cover methods of conducting investigations, both criminal and civil. It will discuss the factors considered in deciding whether to bring a civil or criminal action, pleadings, motions, narrowing of issues, and exploration of settlement without trial. Problems involved in trials will be covered, such as use of oral testimony or documentary evidence, expert witnesses, economic proof, and the burden of proof. There will be valuable points with respect to alternative forms of civil and criminal relief in judgments, consent decrees, appeals, and enforcement procedures.

The session devoted to proceedings of the Federal Trade Commission will begin with a discussion of the types of investigation conducted, ex parte hearings, studies requested by Congress, and recommendations for action. It will cover factors considered in determining whether to bring a proceeding, dismissals by stipulation, pleadings, motions, and settlement without trial. An important part of this session will be a description of the proceedings before the trial examiner, motions, appeals from rulings, admissible evidence, offers of proof and burden of proof. It will discuss forms of relief, appeal to the Commission from the examiner's findings, appeal to and enforcement by the courts, and enforcement procedures.

Details of the spring meeting will be announced in a later issue of the JOURNAL, and an announcement will be sent to all members of the Section.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ Employee stock options, current bankruptcy problems and the Uniform Commercial Code (which will become law in Pennsylvania on July 1, 1954) were the subject of panel discussions held by the Section at the Annual Meeting. These discussions, which represent the current experience of lawyers active in these fields, will be published in future issues of *The Business Lawyer*.

In order to take advantage of the announcement of Ralph Demler, Chairman of the SEC, of a review to be made by the SEC of its activities, procedures and requirements, a new committee of the Section has been formed called the Committee on Federal Regulation. This committee, which will co-operate with the SEC in its review, is composed of lawyers active in matters relating to the SEC and is under the leadership of Glover Johnson, of New York. The committee is already engaged in a review of various statutory provisions.

This Section intends to present programs at the Regional Meeting in Atlanta and at Portland which will be of interest to the members of the Section in those areas. The Committee on Corporate Laws, of which George Seward, of New York, is the Chairman, has already begun consideration of a program to be presented at the Atlanta Regional Meeting.

Forthcoming issues of *The Business Lawyer* will contain reports of the discussion on employee stock options, current bankruptcy problems and the Uniform Commercial Code which were presented at the Annual Meeting in Boston.

SECTION OF CRIMINAL LAW

■ As in prior years, major emphasis will be placed by the Section of Criminal Law on the special projects undertaken by its various committees. Some of the Section's committees have been reorganized, and some new committees have been added. Association members interested in any of the work projects noted briefly below are invited to communicate with the committee chairman indicated.

Crime Portrayal in Public Media (Justin Miller, Pacific Palisades, California): continuing study of crime reporting and crime narratives, and their effects on public morality and law enforcement problems.

International Criminal Law (James J. Robinson, 100 Maryland Avenue N.E., Washington, D.C.): current reappraisal of concept of war crimes; study of possible points of contact between international law and individual conduct and responsibility.

Juvenile Delinquency (Judge Luther Youngdahl, Washington, D.C.): co-operation with and co-ordination among the many studies and projects presently under way in this field; efforts to insure balance and perspective vis-à-vis the problem.

Membership (Myles F. McDonald,

District Attorney, Brooklyn, New York): enlisting interest of lawyers active in criminal field, particularly from defense side; general responsibilities of the profession with regard to criminal law enforcement.

Narcotics and Alcohol (Rufus King, Southern Building, Washington, D. C.): General analysis of conflicting approaches, viz., treatment versus punishment.

Organized Crime (Arthur J. Freund, 501 Olive Street, St. Louis, Missouri): continue work of Commission, press for approved federal legislation, study current trends and developments.

Police Training and Administration (O. W. Wilson, University of California, Berkeley, California): appraisal and evaluation of current developments.

Procedure, Prosecution and Defense (George Morris Fay, Washington, D.C.): co-operation with and assistance to the Special Committee on Criminal Justice.

Scope and Program (James V. Bennett, Department of Justice, Washington, D.C.).

Sentencing, Probation and Parole (Reuben L. Lurie, 85 Devonshire Street, Boston, Massachusetts): press for comprehensive study of probation machinery and practices; responsibilities of profession towards defendants after conviction of crime.

Taxation (Russell Baker, 1 North LaSalle St., Chicago): use of taxing power as deterrant against criminal activities.

Traffic and Magistrate Courts (Evelle Younger, Pacific Mutual Building, Los Angeles): further study of Model Traffic Ordinance; press for acceptance of proper tests for intoxication.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ The House of Delegates unanimously approved at its annual meeting in Boston the recommendation of the Section of International and Comparative Law that a presidential commission consisting of a reporter and an advisory committee be established to draft treaties of international judicial procedure. This action was the culmination of a number of previous resolutions adopted by the Association urging reform of international procedure in civil, criminal, admiralty and administrative matters, with particular reference to serving judicial documents and obtaining evidence abroad, and finding foreign law. Harry LeRoy Jones, Chairman of the Committee on International Judicial Co-operation, which has reported these resolutions to the Section, has discussed the necessity for such reform in his article "International Judicial Assistance: Procedural Chaos and a Program for Reform", 62 *Yale Law Journal* 515 (1953). It is the view of his committee that the establishment of such a presidential commission with representation from both the executive and judicial branches of the Federal Government is necessary in order to command the co-operation of the governments and organized Bars of foreign countries.

Philip W. Amram, the Vice Chairman, represented the Committee at the Vienna Congress on Civil Procedure from October 5 to 8, 1953. The program of the Congress consisted largely of a discussion of procedural matters under the civil law. There were no British lawyers at the meeting and the only other American was Professor Arthur Lenhoff of the University of Buffalo Law School.

Professor Lenhoff opened the Congress with a discussion of the "Recognition and Enforcement of Foreign Judgments in the United States". Mr. Amram led the ensuing discussion, pointing out the problems of the proof of international claims, specifically the difficulties of taking testimony as between civil law and common law countries. He discussed in some detail the proposals to solve these problems through the treaty method and the proposed presidential commission recommended by the Association. Mr. Amram also proposed that the subject of international judicial co-operation and the problem of taking tesimony abroad be given a prominent place on the agenda for the next Congress, and this proposal was unanimously agreed to by the Congress.

SECTION OF JUDICIAL ADMINISTRATION

■ The appointment is announced of Mrs. Maxine Boord Virtue as Director State Activities to succeed A. P. O'Hara, whose resignation was reluctantly accepted by the Council at its annual meeting in Boston. Activities of the Section in each state, organized through a seven-man state committee, include fostering interest in judicial administration and reporting local developments of national interest. A new project being undertaken this year is the assembly for eventual publication of a directory of American judges.

In addition to the work as director, Mrs. Virtue will continue to serve as co-ordinating director of a series of metropolitan court surveys being sponsored by the Section. She is the author of the *Survey of Metropolitan Courts, Detroit Area,* the first of the surveys, which was published in 1950 as a pilot study.

Los Angeles is the latest in the series of metropolitan court studies. Sponsored by the Section, financed by a $77,000 grant from the Haynes Foundation and directed by Professor James G. Holbrook of the School of Law of the University of Southern California, a three-year study of metropolitan trial courts in Los Angeles County got under way in September of 1953. Plans for the study, prepared by Professor Holbrook and by Judge Philbrick McCoy of the Los Angeles Superior Court, a member of the Section's committee on metropolitan trial courts, was approved by the Council and by the Board of Governors during the Boston meeting. An advisory committee of local judges, lawyers and laymen will serve in a consultative capacity to a research staff of

from two to four lawyers who are to emphasize field study of the day-to day operation of agencies concerned with the administration of justice. A fuller description will be found in Volume 29 of the *Los Angeles Bar Bulletin,* at page 7 (October, 1953).

COMMITTEE ON AERONAUTICAL LAW

■ The Committee on Aeronautical Law has been organized into seven subcommittees to carry on its work for the current year. The subcommittees, which will operate under Committee Chairman Charles S. Rhyne, of Washington, D. C., are as follows:

Federal Legislation, Edwin C. Sweeney, Washington, D.C., *Chairman;* Calvin M. Cory, Las Vegas, Nevada; L. Welch Pogue, Washington, D. C.

Federal Administrative Decisions and Federal Court Decisions, Stuart G. Tipton, Washington, D. C., *Chairman;* Alfred L. Wolf, Philadelphia, Pennsylvania; William S. Burton, Cleveland, Ohio.

State Legislation, Madeline C. Dinu, Detroit, Michigan, *Chairman;* Robert K. Bell, Ocean City, New Jersey; Robert A. Detweiler, Philadelphia, Pennsylvania.

State Administrative Decisions and State Court Decisions, Gibson B. Witherspoon, Meridian, Mississippi, *Chairman;* Robert S. Lindsey, Little Rock, Arkansas; Palmer Hutcheson, Jr., Houston, Texas.

Municipal Ordinances, William S. Burton, Cleveland, Ohio, *Chairman;* Charles S. Rhyne, Washington, D. C.; L. Welch Pogue, Washington, D. C.

International Conventions, Lewis F. Powell, Jr., Richmond, Virginia, *Chairman;* Stuart G. Tipton, Washington, D. C.; Alfred L. Wolf, Philadelphia, Pennsylvania.

Helicopter Law, L. Welch Pogue, Washington, D. C., *Chairman;* Lewis F. Powell, Jr., Richmond, Virginia; Palmer Hutcheson, Jr., Houston, Texas.

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

■ The Committee met at the Palmer House in Chicago, October 22-25 inclusive. One of the most important conferences in connection with the meeting was the session on Friday, October 23, which was devoted to the meeting of the National Conference of Lawyers and Certified Public Accountants.

Wide and disturbing areas of disagreement developed for the first time in the Conference pertaining to interpretations of the language contained in the Statement of Principles (Section III thereof) promulgated February 8, 1951, defining the proper areas of practice in federal tax matters between the two professions.

The accountants on the Conference reiterated the position which the American Institute of Accountants previously attempted to maintain before the decisions in the important *Bercu (New York County Lawyers Association* v. *Bercu* (1948) 273 App. Div. 524, 78 N.Y.S. 2d 209, 9 A.L.R. (2) 787), and *Conway (Gardner* v. *Conway* (1951) 234 Minn. 468, 48 N.W. 2d 788) cases—that the field of tax law is mainly a matter of accounting.

It was the consensus of the lawyers in attendance at the Conference meeting that the CPA's failed to realize that more than most specialities in the law, tax law is drawn from and involved with many branches of law. As Justice David Peck said in the Bercu case: "It bridges and is intimately connected, for example, with corporation law, partnership law, property law, the law of sales, trusts and frequently constitutional law. Quite obviously, one trained only in accounting, regardless of specific tax knowledge, does not have the orientation even in tax law to qualify as a tax lawyer. Equally obviously, as a matter of administration, he may not practice any phase of tax law, regardless of what might be his subjective qualifications for the particular undertaking. Inquiry cannot be made in each case as to whether the particular accountant or accountants generally are sufficiently familiar with the law on a particular tax question to be qualified to answer it. An objective line must be drawn, and the point at which it must be drawn, at very least, is where the accountant or nonlawyer undertakes to pass upon a legal question apart from the regular pursuit of his calling.

"Taxation, which permeates almost every phase of modern life, is so inextricably interwoven with nearly every branch of law that one could hardly pick any tax *problem* and say this is a question of pure taxation or pure law wholly unconnected with other legal principles, incidents or ramifications."

It is hoped that the basic differences on construction of the Statements of Principles which have now arisen between the lawyer and accountant members on the National Conference can be resolved amicably without a repudiation of the statement and termination of the co-operative effort previously instituted on a national scale.

The Committee wishes to call to the attention of the Bar that a considerable number of copies of Edwin M. Otterbourg's "Study of Unauthorized Practice of Law" prepared for the Survey of the Legal Profession are still available at Association headquarters. The price is $2.00 for individual copies but a special price of $1.25 is being made for orders of twenty-five or more. This valuable handbook should be made available by bar associations to all members of state and local committees on unauthorized practice, and as the membership of such committees is constantly changing, extra copies should always be on hand at local bar association headquarters. Since committee work in this field is extremely important to the profession as well as to the public, each association can greatly assist its unauthorized practice committee by supplying this very helpful manual.

COMMITTEE ON LEGAL AID WORK

■ Most of the activities of the Standing Committee on Legal Aid Work during the past few months have centered around efforts to co-operate with state and local bar associations that are endeavoring to establish some form of legal aid service for the low income group of their communities.

To assist in this program, which is a joint project of this committee and the National Legal Aid Association, a full-time Field Director has been employed. His services are available to bar associations needing written material, information on what other associations are doing to provide free legal services and representation for the poor and technical advice on the best method of setting up legal aid facilities.

Responding to invitations from local and state bar groups, the Field Director visited associations in Indiana, Illinois, Pennsylvania, Kansas, Oklahoma and New Mexico during September and October. He reports that the lawyers he saw expressed an increased interest in legal aid as a public service of the profession.

Printed information in the way of handbooks, speeches, newspaper clippings and pamphlets is available through the field office. Requests may be mailed to Junius L. Allison, Field Director, 123 West Madison Street, Chicago, Illinois.

This committee considers that promotion of legal aid organizations has three values. First and most important—it fulfills the professional responsibility of helping to give everyone his day in court; second, it provides excellent public relations material for the Bar; and, third, it is the best means of giving a complete answer to those who feel that this service can be effective only if sponsored by the Government.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.**

Prearranged Redemption of a "Nontaxable" Preferred Stock Dividend

■ After forty years and numerous judicial decisions, the federal income tax treatment to be accorded stock dividends is yet to be completely clarified. The position of the Treasury and the courts has vacillated. A recent case decided by the United States Court of Appeals for the Sixth Circuit—*Chamberlin* v. *Commissioner*, decided October 14, 1953, reversing 18 T.C. 164 (1952)—illustrates continued vacillation.

The *Chamberlin* case involved a closely held family corporation in which only common stock was outstanding. The corporation had a substantial amount of accumulated earnings and profits, and therefore a danger of an attack existed under Section 102 of the Code (unreasonable accumulation of surplus). However, the majority stockholder did not want to receive an embarrassing amount of income as dividends which would have been subject to the then 82 per cent (now 92 per cent) surtax rate.

Another method of distribution was devised—the issuance of a preferred stock dividend and the subsequent sale and redemption thereof. A dividend distribution to the stockholders of 8000 shares of preferred stock was effected in 1946. Two days later, by prearrangement, the stockholders entered into an agreement to sell the preferred stock to two insurance companies. This stock was to be redeemed over a period of eight years. The insurance companies obtained certain safeguards for the future redemption of the stock. For instance, the corporate charter was amended to provide that the corporation was required to maintain a working capital in an amount at least equal to 150 per cent of the par value of the preferred. And, by operation of sinking fund provisions, 3000 shares (or 3/8) of the preferred had been redeemed and cancelled by 1950.

The Commissioner determined and the Tax Court held that the receipt of preferred stock was taxable (to the extent of its sales price) as a dividend (ordinary income) to the recipient stockholders. Judge Tietjens, speaking for the majority of the Tax Court (Arundell, J., dissenting) reasoned that this transaction was an attempt to siphon off corporate earnings at capital-gains rates while the recipient stockholders retained control of the corporation. The Sixth Circuit reversed and held that the preferred stock dividend was not taxable upon its receipt under the explicit provisions of the Code and under the authority of certain Supreme Court decisions. The taxable event was the sale of the stock to the insurance companies, and since this was the sale of a capital asset deemed to have been held for more than six months (under § 117 (h)(5)), the effective tax rate was 25 per cent.

The general rule is that a stock dividend which does not change the proportionate interest of the recipient-stockholder does not result in the receipt of income. This plan, at least as to form, came within this rule; for the receipt of preferred stock with only common outstanding was determined to be nontaxable in *Strassburger* v. *Commissioner*, 318 U.S. 604 (1943). The Government argued that the *Chamberlin* situation was removed from the coverage

of the *Strassburger* rule by reason of the prearranged sale of the stock and its subsequent redemption. Even though the money came into the stockholder's hands from the insurance companies, and not from the corporation, the Government contended that this was in effect a stock redemption taxable as a dividend under Section 115 (g). The Government emphasized the fact that when the redemption is completed several years after the issuance of the stock dividend the stockholders are in this situation: the earnings have been "bailed out" of the corporation at capital-gains rates and the stockholders own precisely the same equity interest in the corporation as they did initially.

There has been much literature on this subject in the past few years (*e.g.*, Darrell, "Recent Developments in Nontaxable Reorganizations and Stock Dividends", 61 *Harv. L. Rev.* 958 (1948) and DeWind, "Preferred Stock 'Bail-Outs' and the Income Tax", 62 *Harv. L. Rev.* 1126 (1949). Regardless of divergent positions among the commentators, it has been uniformly agreed that the receipt of a preferred stock dividend involving a prearranged sale and redemption—as in *Chamberlin*—should be accorded ordinary income treatment.

The reversal by the Sixth Circuit, therefore, comes to some as a surprise. It would not be much of a step for the courts to bring this case within the principle of a legion of other cases in the income tax field in which the form of the transaction has been ignored—or in which several steps (*i.e.*, dividend, sale and redemption) have been considered as one for purposes of the income tax law (a so-called "integrated" or "step" transaction).

The Tax Court upheld the Commissioner's action on at least three grounds: (1) the stock dividend was not issued in good faith for any bona fide corporate "business purpose"; (2) the real purpose of the issuance was to place the new preferred in the hands of others than the stockholders, thereby substantially altering the common stockholders' pre-existing proportionate interests; and (3) the entire plan was designed to effectuate the will of the corporation's stockholders, who wanted to do one thing—realize the equivalent of "cash" from their investment.

The Sixth Circuit disagreed. It stated that the doctrine of "business purpose" had no place in this area of the law, and that its application had never before been suggested here. The only test, as indicated, is one of proportionate interest. The appellate court stated further that a nontaxable stock dividend did not become taxable upon its subsequent sale. Moreover, the court reasoned that the "substance over form" cases were not applicable because the issuance of the stock dividend was such a dividend in substance as well as in form.

The circuit court also referred to another familiar proposition in the tax field, *i.e.*, that the existence of a tax avoidance motive is, in most instances, irrelevant. As Judge Magruder has recently noted, while a desire to save taxes is not "rightly" significant, "it sometimes is permitted to give a spurious flavor" to an argument. *Channing* v. *Hassett*, 200 F. 2d 514, 516 (1st Cir. 1952).

Thus, the *Chamberlin* case presents a medium for effecting a conversion of ordinary income into capital gains. It can be expected that if this exemption is not judicially removed, the Treasury will attempt to have it removed legislatively; for, if the Commissioner cannot prevail here, he has no presently available weapon against the "bail-out" device.

The area of stock dividends has been considered in the past to present questions of such importance to the administration of the revenue laws as to render proper the granting of a petition for certiorari. A Supreme Court reversal in this case, however, would only add to the uncertainty in the stock dividend area. An affirmance by the Supreme Court of this position, on the other hand, would not be completely insulative, because, as the Court of Appeals emphasized, each one of these cases is to be decided on its own facts.

Contributed by committee member George D. Webster.

The Disadvantages of Social Security for Lawyers

(*Continued from page 43*)

System. The self-employed professional indirectly, but none the less effectively, makes his contribution to the Social Security program by the higher price he pays for goods and services bought from those who directly contribute to the System. The Social Security System, as Dean Larson himself points out, was designed to be "approximately self-supporting" and does not call for direct subsidization by self-employed lawyers. Such subsidization would as a practical matter be a small ineffectual drop in a very large bucket. The public interest is not served by ineffectual gestures, but rather by a realistic legislative approach designed to solve specific problems.

The Social Security System is now under review by the Congress. Rather than a Procustean bed approach, we urge that a study be made looking toward designing a program fitted to the economic and social facts of professional life. We suggest that a likely solution may be to provide the opportunity for self-employed persons to arrange their own retirement program. Such an opportunity might be provided by tax legislation offering self-employed professionals tax deduction for limited payments into a qualified pension fund.

ALLEN L. OLIVER
Chairman, Committee on Unemployment and Social Security
Cape Girardeau, Missouri

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The Fourteenth Annual Tax School, sponsored by the Iowa State Bar Association, was held in Des Moines in December. The principal speaker was T. Coleman Andrews, Commissioner of Internal Revenue, who spoke at the Tax School banquet.

The subjects covered were divided into five different clinics covering the broad subject matters which questionnaires—previously sent to the members—had indicated were of the most interest. The subjects discussed included: individual income tax, estate and gift taxes, farmers' tax, internal revenue service dealings and employee benefit plans.

■ The National Legal Aid Conference was held on October 28, 29 and 30 in Washington, D. C. The Conference delegates considered such problems as legal aid in criminal cases, family cases, law students in legal aid work, community relationships and the role of legal aid in the legal assistance program of the armed forces.

In the evening, the delegates traveled to Baltimore to participate in the dedication ceremonies of the new offices of the Baltimore Legal Aid Bureau, at which Harrison Tweed of New York, spoke. [See our full account of the dedication beginning at page 24.]

■ The Special Committee on Military Justice, Abraham S. Robinson, Chairman, of The Association of the Bar of the City of New York, sponsored a forum in September on the administration of military justice under the Uniform Code. The forum was held at New York University Law School auditorium.

At the morning session, the Judges of the United States Court of Military Appeals, Chief Judge Robert E. Quinn, Judge George W. Latimer and Judge Paul W. Brosman, discussed the experience of their court after two years of operation under the new code.

At the afternoon session, Major General E. M. Brannon, Judge Advocate General of the Army, Rear Admiral Ira H. Nunn, Judge Advocate General of the Navy and Major General Reginald C. Harmon, Judge Advocate General of the Air Force, spoke on "The Role of the Judge Advocates General in Military Appeals". Following this discussion, Felix E. Larkin, former General Counsel of the Department of Defense, Whitney North Seymour, former President of the Association, and the Reverend Father Robert J. White, former Dean of Catholic University, led a panel discussion on the question of whether the Uniform Code has improved the courts-martial system.

Glenn R. JACK

■ The newly elected officers of the Oregon State Bar assumed office at the concluding session of the annual convention in September. Glenn R. Jack, of Oregon City, was elected President by the board of governors. Carl A. Dahl, Portland, Allen G. Fletcher, Portland, and Lee W. Karr, Portland, were elected Vice President, Treasurer and Secretary.

Eugene M. PRINCE

■ During the annual convention in October of the State Bar of California, the new Board of Governors elected Eugene M. Prince of San Francisco, President. Roy A. Gustafson of Ventura, Ross C. Fisher of Los Angeles, and Albert Launer of Fullerton were elected Vice Presidents. Allyn H. Barber of Pasadena and Jack A. Hayes of San Francisco were elected Treasurer and Secretary.

■ E. Harold Hallows, of Milwaukee, President of the Wisconsin Bar Association, in his October report reviewed the recent activities of the association. Several special committees were appointed, one of which, the Administrative Law Advisory Committee, was formed to assist in studying the rule-making power of administrative bodies. A committee to organize a ladies' auxiliary was also appointed.

Mr. Hallows named seven representatives and alternates to the Criminal Code Advisory Committee, which was created by the legislature to study and report on the criminal code with proposed amendments for submission to the 1955 legislature.

The President noted the result of efforts to build up the sections of the Association where 328 members are enrolled in the Real Property, Trust and Probate Section, 231 in the Taxation Section, 189 in the Insurance Section and 106 in the House Counsel Section. Three new sections are also in the process of creation, a Labor Law Section, a Corporation and Business Law Section and a Bar Officers Section.

■ At the monthly meeting of the Akron Bar Association in November, Dr. John Schoff Millis, President of Western Reserve University, spoke. Dr. Millis selected as his subject, "Expanding Horizons of Higher Education". C. D. Russell, Executive Vice President of Western Reserve University and formerly a member of the Akron Bar, introduced Dr. Millis.

■ County and city bar associations in Ohio report varied and interesting programs. The Columbus Bar Association heard Lloyd M. Shupe, the Columbus Police Department Chemist, speak on "The Chemistry of the Drinking Driver" on October 14. Dean Frank R. Strong of Ohio State University College of Law spoke at the October meeting on "Recent Developments in Legal Education".

The Jefferson County Bar Association elected Clyde Chalifant, of Steubenville, to serve as President for the ensuing year to succeed Samuel Freifield, retiring President. Others named to serve with the new President include Jesse K. George, Vice President, William D. Campbell, Secretary, and Leroy G. Schell, Treasurer.

The Lucas County Bar Association on October 12 heard Judge Perry B. Jackson of the Cleveland Muncipal Court speak on "The Court Looks at the Lawyer". At the October 26 meeting, Judge Kingsley A. Taft of the Ohio Supreme Court was the guest speaker and discussed the Ohio Constitution and the state's improvement in legal procedure during the last several years.

"A Glimpse of the Far East" was the subject of an address presented by Ohio Supreme Court Judge James Garfield Stewart, at the October 26 meeting of the Dayton Bar Association. Judge Stewart has recently returned from a tour of Japan, Hongkong, the Chinese border, the Philippine Islands and Honolulu.

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

Getting Organized

■ Immediately after his election last August, our Chairman for 1954, C. Baxter Jones, Jr., of Atlanta, convened the first meeting of the "Board", consisting of the Chairman, the newly elected Vice Chairman, Stanley Balbach of Urbana, Illinois, and your Editor, as Secretary, and the four Directors to serve in 1954, appointed by Chairman Jones, S. Michael Schatz of Hartford, Connecticut, Personnel Director; Frank E. Horka of Baltimore, Maryland, Information Director; Robert G. Storey, Jr., of Dallas, Texas, Professional Director; and Rosemary Scott of Grand Rapids, Michigan, Service Director. General plans and Committee appointments were discussed in Boston but the real work in organization has been done well before the first of January. In the four months since the Annual Meeting, Baxter Jones has been hard at work setting up the team that will work with him during this year. As soon as principal Committee appointments had been made, our Chairman made a tour up the East Coast and out to the Middle West talking with officers, committee chairmen, and circuit members of the Council wherever possible, outlining plans and discussing program. Between these efforts and a busy law practice, the Chairman put the finishing touches on the *1954 JBC Handbook*, which has been distributed to all the members of the team for '54, and which for the first time provides all JBC officials with a comprehensive outline of the structure and functions of our Conference. The "Board" held its second meeting in Washington, D. C., on December 4 and 5. At that time reports were received from officers and directors on the status of the various committees and tasks of the Conference. In addition plans were made for the forthcoming Mid-Winter Meeting of the Council of the Conference, to be held in Atlanta, Georgia, March 6 and 7, 1954. There was a general discussion of the function that our Conference was to play in the forthcoming Regional Meetings of the Association—Atlanta, Georgia, in March, and in Portland, Oregon in May. Other matters considered were assistance to the American Bar Center Fund Campaign, the Annual Meeting in Chicago next August and reapportionment of the Council. By the time this report reaches you, your officers, directors, circuit members of the Council, committee chairmen and members will all have been briefed for the Conference program for this year.

The Florida Junior Bar Section

by E. B. Rood

■ The State Junior Bar of Florida has been an active organization since 1935. In 1949 the State Bar of Florida was integrated, and all members who have not yet reached 36 years of age automatically become members of the Florida Junior Bar Section. There are no separate dues for membership in the Junior Bar Section, and the Section is an active part of The Florida Bar.

The Junior Bar has had the generous support of the state Bar, and the President of the Junior Bar automatically becomes a member of the Board of Governors of The Florida Bar.

At the beginning of each year, the Junior Bar submits its budget to the Board of Governors of the state Bar. Each year since integration the senior Bar has given at least $1,000 to the Junior Bar Section.

The officers are a President, a President-Elect, a Secretary and a Treasurer, and from one to three

members of the Board of Governors elected from each of the sixteen circuits of the state. The officers serve for a term of one year, and the Governors for a term of two years. One half of the Governors are elected each year, so that there are always carry-over members on the Board.

The annual meeting of the Section is held during the meeting of the state Bar in the spring of each year. At the last meeting in the spring of 1953, over two hundred members attended.

The Board of Governors meets four times a year in various parts of the state. Members of the Board who miss two meetings in succession are automatically removed from office and a new governor is selected.

Although no direct control is maintained by the state Junior Bar over the local junior bar associations, each local association is kept advised of all activities of the State Junior Bar in which the local organization might be of assistance. The State Junior Bar also offers assistance and advice to each local association. All the local organizations in the state are affiliated with the national Junior Bar Conference.

The State Junior Bar of Florida has concentrated its activities for the past several years in the work of a few committees.

One of the most active committees has been the Public Information Committee. That Committee has prepared many fine radio transcriptions that have been circulated throughout the entire state. The transcriptions received such fine comment that The Florida Bar has now taken on the project, supplying the additional money and support needed.

One of the most important activities of the Florida Junior Bar is its program for the assistance of law students. This committee has made it possible for law students who want to gain experience during the summer to get jobs as summer law clerks with practicing lawyers or law firms. Early in the year the committee makes up a list of openings and possible openings for summer law clerks and circulates this information to the law students in each of the law schools of the state.

The Junior Bar Section has been active in promoting Legal Aid and the Lawyer Reference Service, and was instrumental during the past year in getting a Lawyer Reference Service started in Tampa.

Every two years, the most active committee of the Junior Bar Section is the Legislative Committee, which prepares in proper form bills for the legislature which are pertinent to the purposes of the state Bar. The subject matter of the bills is determined by The Florida Bar, and the completed bills are given to the Board of Governors of The State Bar for amendment, approval or disapproval. Although no final action has been taken, The Junior Bar Section has been working for three years on a bill which would define unauthorized practice of the law.

The Uniform Title Standards Committee of the Junior Bar has been working on its tremendous project for the past three years. The Committee of the Junior Bar has completed its work, and the Uniform Title Standards which it has prepared will be of tremendous assistance to all title lawyers in the State of Florida, once they have been approved.

Although it is now fully sponsored and supervised by The Florida Bar, The Lawyers Title Guaranty Fund received its impetus and initial sponsorship from The Junior Bar Section of The Florida Bar. This fund has been working successfully in the State of Florida for several years now and has received favorable publicity throughout the country. It provides a means by which qualified attorneys may provide clients with all the advantages, benefits and securities afforded by corporate title insurance companies while still retaining the individual professional relationship between lawyer and client. This has been done through a co-operative Common Law Trust of which over 1200 Florida lawyers have now become members.

At the annual meeting of the Bar, the Junior Bar Section sponsors a luncheon honoring the presidents of each of the local bar associations. At these meetings the Junior Bar Section has endeavored not only to honor the presidents of the local group, but also has tried to promote interest in the work of the integrated Bar.

The Florida Junior Bar Section has tried to co-operate with all of the activities of the Junior Bar Conference and the American Bar Association. It has participated actively in each membership drive, and has been represented at all of the annual meetings of the national Conference.

The Florida Junior Bar has played a vital part in the activities of The Florida Bar, and Junior Bar work has made the younger lawyers of Florida better and more active members of The Florida Bar.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

PATENTS– *"Some Recent Developments in Patent-Antitrust Law"*: The Fall, 1952, issue of the *Marquette Law Review* (Vol. 36-No. 2; pages 143-155) contains this address given by Newell A. Clapp, Acting Assistant Attorney General of the United States. This article is especially interesting in that it gives the viewpoint of one of the men who enforces the law. Mr. Clapp discusses the effect of recent legislation and court decisions on the relation between the patent and antitrust laws, especially as regards tie-in, price-fixing and pooling arrangements and compulsory licensing. Under the previous law, relief for patent infringement was denied when the patentee had required purchase of unpatented goods for use with his patent, on the theory that he comes into court with "unclean hands". Section 211 (c) and (d) of the new Patent Code, effective January 1, 1953, states that the fact that a patentee is enforcing his patent shall not, in itself, constitute misuse of the patent. While recognizing that the courts may decide differently, Mr. Clapp is of the opinion that no change in the existing law was intended. These patent "tie-in" arrangements have been attacked also under the antitrust laws, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The new Patent Code is not in conflict with those laws, which probably would not be repealed by implication anyway. The rule on price fixing through patent licensing agreements was that although a patentee could license one other person to make and sell the patented article at a fixed price, price fixing by licensing all members of an industry was invalid. The recent decisions have expanded this rule so that price fixing by licensing substantially all members in an industry, and in one case by licensing two out of five competitors, was illegal. Another recent case reaffirmed the rule on patent pooling by holding that a combination of patentees and licensees which would require joint consent before others could be licensed would be invalid. As regards patent pooling and price fixing, the courts have shown no indication of retreating from earlier positions. The Supreme Court had refused earlier to sanction compulsory royalty-free licensing of abused patents, but recently courts have ordered compulsory licensing on a reasonable royalty basis, and in some instances on a royalty-free basis. The Department's position has been, and is, that compulsory royalty-free licensing is necessary for relief, and is legal in appropriate but rare cases. The most recent Supreme Court decision on the problem indicates that not only is compulsory licensing a well-recognized remedy in patent abuse cases, but that it could be ordered of future patents as well as existing patents. In conclusion Mr. Clapp points out that both the patent laws and antitrust laws are designed for a vigorous, free competitive economy, and that patentees who do not abuse the patent grant need have no fear of the antitrust laws. (Address: Marquette Law Review, 1103 West Wisconsin Avenue, Milwaukee 3, Wisconsin; price for a single copy, $1.00.)

PATENTS–*"Design Patents and Copyrights: The Scope of Protection"*: This article written by David P. Kelly in the January issue of the *George Washington Law Review* (Vol. 21 - No. 3; pages 353-367) discusses the protection afforded patents and copyrights under Article I, Section 8, Clause 8 of the Constitution. Pointing out that recent court decisions have created confusion by holding that the two types of protection are not mutually exclusive, the authors presents a study of the history and philosophical basis of both types of protection in an effort to show that each type has an entirely different and totally unrelated origin and each was created to protect a different form of endeavor. In conclusion, the author shows how the courts, by erroneously reading limitations into the copyright act, require an applicant to elect which form of protection he will have, thus forcing upon him the risk of choosing the wrong form with a consequent loss of protection. (Address: George Washington Law Review, 720 20th St., N.W. Washington 6, D.C.; price for a single copy: $1.00.)

TAXATION–*"Blockage and The Invested Capital Credit"*: In the January, 1953, issue of the *Tax Law Review* (Vol. 8–No. 2; pages 131–153), the then President of the New York State Bar Association, Weston Vernon, Jr., and Robert T. Molloy, continued their literary collaboration in the exploration of the blockage valuation doctrine's application to the ascertainment of a corporation's invested capital credit. Where assets are acquired for stock possessed of a readily ascertainable fair market value, as in the case of shares listed on a registered security exchange, the fair market value of such assets may be equal to the fair market value of the shares. When a large block of shares is to be valued for federal income, gift or estate tax purposes it is established that a discount to reflect the holder's inability to realize immediately on

all the shares may be in order. The authors report that revenue agents are taking the view that a similar discount for "blockage" must be made in computing a corporation's invested capital credit where assets had been acquired for such corporation's stock under conditions such that the assets possessed a cost, and not a substituted, basis in the hands of the acquiring corporation. Prior to January, 1936, acquisitions were frequently made without the recognition of gain or loss but nonetheless resulted in a new basis equal to the then fair market value of the shares given in exchange (I. R. C. § 113 (a) (7)). Where a corporation computes its excess profits tax credit on the net asset, or on the historical invested capital method, "blockage" may well prove a factor with which to contend if the taxpayer over the years has grown by acquisition in exchange for its own stock. The only excess profit tax case applying the blockage doctrine, *Colonial Fabrics, Inc.* (T.C. Dkt. No. 23563, January 22, 1951, 10 T.C.M. 66, P-H T.C.Mem.Dec.I 51, 030) has recently been affirmed in *Colonial Fabrics, Inc.* v. *Commissioner*, 202 F. 2d 105 (2d Cir. February 16, 1953). (Address: Tax Law Review, New York University School of Law, Washington Square, New York 3, N.Y.; price for a single copy: $2.00.)

TELEVISION—*"Television and the Right of Privacy":* The Fall, 1952, issue of the *Marquette Law Review* (Vol. 36 - No. 2; pages 157-166) contains an interesting comment on television and the individual's right of privacy. The article traces the development of the right of privacy and its growth as an independent right. Cases involving privacy that have arisen in allied media of communication such as radio, motion pictures and newsreels, are analyzed to determine whether or not the precedents announced in those cases are suitable for application to television problems. The writer points out that due to the lack of litigation, thus far, involving television it is still questionable as to how far these precedents will be applied to television. Some courts have already done so and apparently the results have been satisfactory. In applying these analogous cases, it is necessary to keep in mind the difference between television and other media as to scope, production methods and types of events depicted. Essentially the problem resolves itself into a clash between the private rights of the individual and the public rights to a free flow of news and information. (Address: Marquette Law Review, 1103 W. Wisconsin Ave., Milwaukee 3, Wisconsin; price for a single copy: $1.00.)

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1954 Annual Meeting and ending at the adjournment of the 1957 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

Nominating petitions for all State Delegates to be elected in 1954 must be filed with the Board of Elections not later than March 19, 1954. Petitions received too late for publication in the March issue of the JOURNAL (deadline for March issue, January 28; deadline for April issue, February 25) cannot be published prior to distribution of ballots, fixed by the Board of Elections for March 30, 1954. Ballots must be returned by June 7, 1954.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 19, 1954.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts) nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will mailed on March 30, 1954, to the members in good standing accredited to the states in which elections are to be held as above stated.

BOARD OF ELECTIONS.
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

The Five Functions of the Lawyer

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the prevention of delay and that they are to be construed to that end with the privilege of waiving them when they would work injustice. Rules of court make for avoiding decisions on technicalities. The rule-making process must be a continuous process, and there should be some body in the state, either a judicial conference or a judicial council, which reviews the rules annually to see if they can be improved in the light of experience.

Most of all in this country we need to give the trial judge real power. Believe it or not, there are over twenty-five states in the Union where the trial judge is not allowed to comment on the evidence, where he is not allowed to ask questions even though neither plaintiff's nor defendant's counsel has brought out what the judge sees is the pertinent fact concerning which a particular witness should testify. In these states the judges are not allowed to sum up in their own language to the jury, but, on the contrary, they take their instructions from either one or the other of the trial counsel, and that is called a charge.

Also, in these states, just to make sure that reading these writen instructions doesn't amount to anything, the code of procedure provides that the judge must give his charge before counsel for the defendant and counsel for the plaintiff sum up to the jury. Now, if I were to stand here and mumble seven or eight typewritten pages of legalistic requests to charge and that was to be followed by two impassioned addresses by other lawyers, I submit that no jury would remember a single word that I had said. They would merely remember that the other lawyers had said it all better than I had because they had been talking to them and I was only reading.

This putting of the trial judge in a strait jacket occurs in over one half of our states. If you come from one of these backward states, one of your first jobs is to make your professor of procedure conscious of that fact, because he is probably taking it for granted that that is a necessary and natural way to try a case. You can begin to improve the work of your courts right away by asking, "Why cannot we give our trial judges real power as they do at common law and in the federal courts and in many of the states?"

Another major cause of complaint about our courts is the occasional bad manners of judges. Some judges are just constitutionally cross-grained. They never should have been permitted to get on the Bench, and there should be some method devised for getting rid of them. One of the things that makes judges irritable, I am told, is the pressure of work. When a judge is conscious that he has twenty-five or thirty cases undecided, how can he be cheerful when he says, "Good morning"? He just can't be, because he has missed the moment of decision in those twenty-five or thirty undecided cases, and he realizes that he will never do as well as he might have done in these cases.

Another thing that makes some judges irritable is the consciousness that they are subject to political pressure. We all like to be free and independent, but if you happen to be an unfortunate judge who is subject to politics—and I have had judges tell me that they know what that means—that makes for bad manners. So the thing to do is to get rid of political pressure.

That brings us right to the heart of the matter. To have good judicial administration, to have good judges, you need judges who know the law, you need judges who can think, you need judges who can express themselves, you need judges who are diligent, you need judges who are honest, and you need judges who the public believes are honest. Those are all reasonable qualifications, and yet in a national poll taken not too long ago, 28 per cent of those questioned said in so many words that they did not think that their local and county judges were honest. I know that these 28 per cent are wrong in their impressions of their judges—I would stake my life on that statement—but the fact that the public *thinks* they are dishonest is just as bad from the standpoint of respect for the law as if they were in fact so.

Why does the public have that notion? Obviously, it gets the notion because your local police judges, your local justices of the peace, and your county judges in many states are forced to run for election on a partisan ticket. They travel around with the candidate for governor, for senator, for Congress, and for the state legislature, and all the other fellows running for election, and they attend political meetings, dinners and clambakes. How can the people think the judge is any different from all the rest of the politicians who are running for election? Those who are informed know that the county judge is the smartest of these politicians and probably is planning the whole campaign. Indeed, in certain states it is admitted by everybody in the county that the county judge is the unofficial head of the dominant political party. In fact, if he isn't, he isn't going to be re-elected when his term expires. That is how the public gets its notions about its local judges who run in political primaries and elections.

Does it not suggest to us that in every state we should carefully examine the method of the selection of judges—and that goes for the appointed judges as well as elected judges? If the governor is not supported and buttressed by the strong opinion of the Bar to appoint the right kind of judges, you won't ordinarily get them by the appointive process any more than you will through partisan elections. But we need more than good judges. We also need jurors who are representative of the honest and intelligent citizenry of the county if the fact-finding of our courts is to be done properly.

These are some of the pressing problems in the administration of justice that you should keep in mind in law school as well as in practice.

Our system of popular government cannot survive without a clear recognition of the supremacy of law. Sound procedure in the courts is quite as important as sound substantive law. These problems all relate to improving the administration of justice, but there are many other equally important points relating to the betterment of the profession and the adaptation of our substantive law to the needs of the times that should engage your attention from your earliest days in law school. Above and beyond all that, you need to cultivate from the beginning an active and intelligent interest in public affairs if you are to be great lawyers, so as to qualify as leaders of public opinion and eventually as our leaders in public office.

Interest and action with respect to all of these matters are essential to the great lawyer, and the desired results are all attainable if you pursue the law in the spirit of Mr. Justice Holmes. Let me end by quoting him:

"Law is a business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and when I perceive what seems to me to be the ideal of its future, if I hesitated to point it out and press toward it with all my heart."

The Reed-Dirksen Amendment

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corporations to 37 per cent, or (2) to reduce the 52 per cent rate on the large corporations to 45 per cent. The first course would increase the revenue. The second course would reduce it by a little less than $3 billion. This is equal to the revenue from a manufacturers' excise tax of 2½ per cent applied to all end products of manufacture, except food, food products and liquor and tobacco. It is equal to the revenue from a retail sales tax of less than 2 per cent.

In this discussion I am disregarding the excess profits tax, for the reason that it appears to be rather generally agreed that it is most harmful to the economy and that there is very little likelihood it will ever be re-enacted. In the language of Secretary of the Treasury Humphrey, "The worst enemies of the excess profits tax can voice our feelings about it." It was scheduled to expire on June 30, 1953, but at the insistence of President Eisenhower that the revenue was needed to help balance the budget the expiration date was extended to December 31. The amount of revenue which it was estimated the tax would produce during the last six months of 1953 was $800 million.

Professor Cary's Five Questions

Professor Cary closes his article by asking the proponents of the Amendment five questions, which, speaking for myself only, I would answer as follows:

Question 1. Do they oppose high taxation regardless of government expenditures and consequent deficit financing in a period of the highest prosperity in our history?

Answer. I regard balancing the budget as of fundamental importance. I oppose, however, attempting to do so in the communist or socialist way by confiscatory rates of income and death taxes, for the reason that such course will in due time lead to the production of less revenue than moderate rates and will ultimately destroy our system of private enterprise.

Question 2. Do they oppose present high surtax brackets under the individual income tax and merely ask to have the rates lowered, or do they deny the basic principle of ability to pay and thus any form of progressive taxation?

Answer. As I have stated in my first two articles published in the January and March, 1953, issues of the JOURNAL, I consider the so-called principle (if it may be dignified by such a title) of "taxation in accordance with ability to pay", as interpreted and applied by its proponents, utterly unsound. It is not an economic concept having any defined limits or based upon any scientific principle. The sound and justifiable method of taxing income is at a *flat or proportional rate.* To quote Dr. Harley L. Lutz,

> This, indeed is what Adam Smith, the originator of the whole ability concept, proposed. His first maxim of taxation, which has been the source of the ability to pay doctrine, was in part as follows: "The subjects of every state ought to contribute towards the support of the government as nearly as possible, *in proportion* to their respective abilities; that is, *in proportion* to the revenues which they respectively enjoy under the protection of the state. [Italics provided.]

As I have pointed out, however, the proposed Amendment does not prohibit tax rate progression. It merely limits its degree.

Question 3. Since there is relatively little progression in the corporation income tax structure, should a ceiling apply in exactly the same pattern to corporations and to individuals?

Answer. If I understand the meaning of this question, my answer is that the ceiling should not apply in exactly the same pattern to corporations and to individuals. This I have already discussed.

Question 4. Do they wish to accept the alternative of advocating a sales tax in the neighborhood of 15 per cent on all items except food, or 10 per cent on all items?

Answer. If Professor Cary means by this that a choice must be made between (1) continuing the present rates of taxation on incomes, inheritances and gifts, and (2) having a sales tax, I would of course choose the latter. His rates of 15 per cent and 10 per cent, however, are grossly excessive. As I have previously stated, the changes in the rates of the individual income tax and estate and gift taxes made necessary by the Amendment would result in an *immediate* loss of revenue of less than $3 billion. This is equal to the revenue from a manufacturers' excise tax of 2½% on all end products of manufacture, except food, food products, and liquor and tobacco. It is equal to the revenue from a retail sales tax of less than 2 per cent.

If the 52 per cent rate on the large corporations is reduced to 45 per cent, there would be an additional loss of revenue of a little less than $3 billion. This loss, with the first, would total less than $6 billion, and could be made up by a manufacturers' excise tax of 5 per cent applied to all end products of manufacture, except food, food products, and liquor and tobacco, or by a retail sales tax of less than 4 per cent.

It should be observed that the losses in revenue above indicated would be only temporary, and that the ultimate effect of the lower rates required by the Amendment, as I have already explained, would be to increase the revenue.

Futhermore, regarding the various tax cuts which we have discussed, and the need of other sources of revenues to make up the loss, is anyone so naïve as to believe that substantial savings to offset the cuts cannot be made in the federal budget? The evidence points irresistibly to the existence of enormous waste and wholly unjustifiable handouts. For example, it was recently reported that foreign aid runs to as much as $7 billion, a substantial portion of which is for economic aid.

Question 5. After deciding which of these principles they stand for, do they believe it advisable for a country which is likely to face further international crises to strait-jacket its fiscal policy by a constitutional provision?

Answer. The answer to this is clear. The country's fiscal policy would not be "strait-jacketed" by the proposed amendment. The amendment would greatly strengthen our fiscal position and assure the continuation of our private enterprise system and the liberty of the individual, which are essential to the continued well-being of the American people.

Laws and Lawyers of the Far East

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of their nation on constitutional principles.

I was privileged to meet and visit with their Supreme Court and their Attorney General and then to observe a session of the court. Let me try to give you the picture. The courtroom, the furnishings, the arrangements, judges on the bench, lawyers addressing the court in English, all was as in many an American appellate courtroom. The proceedings were formal, dignified, serious. Here was the difference. The judges of that court were dressed in the native costume of Burmese gentlemen, with the brilliant-colored *aingyi* (jacket) and *longyi* (skirt) and pastel-colored *gaung baung* (headdress). Over that dress they wore the scarlet robes of the English judge. Lawyers, some dressed in formal Western style, others in Burmese dress, all wore the robes of the English Bar. By their native costumes the judges held out to the world their pride in their race, their nation and their duty to advance the cause of their government of free peoples. There was the Supreme Court of Burma functioning, serving in its constitutional capacity and power. But why the English robes in a country free from English political power? The answer can be found in our own experience. We cast aside the political power of England, and at the same time retained its common law, its equity and wrote many of England's laws into our constitutions and statutes. And so the Burmese as a new nation recognize the persuasive power of that system of laws by which free men have proved an ability to live together in an organized society—and remain free. In their law college at Rangoon I found English-educated, cultured gentlemen, lawyers and judges teaching not only the elements of the law, but the necessity, if free men are to remain free, of maintaining constitutional rights through an independent judiciary administering justice according to law.

Taiwan

Twenty minutes by air, off the east coast of China, is a spot long known as the Beautiful Isle—we know it by the name of Formosa. To the Chinese it is Taiwan—and such it is now called since the Chinese again are sovereign there.

Its present constitution was promulgated in January, 1947. Constitutional government was established in May, 1948. It begins, as do the others I have mentioned, with a series of "Rights and Obligations of the People" which in the main could be easily correlated with our own. It provides "all the freedom and rights enumerated in the preceding articles may not be restricted by law, except for reasons of preventing infringement upon the freedoms of other persons, averting an imminent crisis, maintaining social order or advancing general welfare".

The Chinese Constitution provides, not for three, but five co-ordinate departments of government.

The Chinese word for them is *yuan*. There are the three standard or Executive, Legislative, and Judicial Yuan. Then the Examination

and Control Yuan. The Examination Yuan is, generally speaking, a civil service commission. The Control Yuan has many powers comparable to our Senate. It has the power of impeachment, of "consent" to appointments and certain of the attributes of our general accounting office.

Within the Judicial Yuan there are four sets of organs or courts. The Supreme Court heads a series of courts for the adjudication of civil and criminal cases in the ordinary meaning of those terms. There is an administrative court for the adjudication of administrative cases. There is a committee for the adjudication of disciplinary matters and finally there is the Council of Grand Justices for the interpretation of the constitution and unification of divergent interpretation of laws and executive orders. These four organs function under the President of the Judicial Yuan. The constitution provides: "When doubt arises as to whether or not a law is a contravention of the Constitution, the Judicial Yuan shall render an opinion thereon." Although somewhat different from ours, it appears that their courts are organized as an independent judiciary, with powers to enforce and protect constitutional rights, grants and limitations of powers.

I cannot within the limited space here describe their courts. I visited them and watched their functioning. Two trials may be mentioned. They were the review of trials of men charged with and convicted of murder. Following the continental system, the chief judge was examining the accused, in both instances, laborers. There was an essential dignity to the proceedings. The accused showed neither awe nor fear, nor sullenness. Rather they told their story and in effect plead their own cases. I could not understand what was being said—I could read the faces of those there. I had a distinct impression that an honest, sincere effort was being made to develop the facts, arrive at the truth and apply the law. It was a reassuring experience.

I found one court in a populous Chinese city which should be mentioned. It was called the "Compromise Court". To it are referred those cases that the presiding judge feels should be settled. It is pretrial in its essence—and they have had that kind of a court for years!

It must be recognized that military courts in security matters exercise jursidiction over civilians on Taiwan. That has been criticized in America. It must be recognized, also, that here is a nation and government at war with "Red China" with the enemy only ninety miles away across the Straits of Formosa. It was reassuring to be told that the exercise of such military court jurisdiction was being gradually supplanted by the civil courts.

The lawyers in the Far East individually and in their associations are actively considering the problems concerned with the administration of justice. I was asked about the election of judges, its advantages and disadvantages over the appointive system. I was asked about the use of cross-examination by the lawyer—as supplementing or supplanting the questioning by judges in the probing for the truth. Habeas corpus, its meaning, and its scope came often into the conversations.

I was asked many questions about the jury system, not only in relation to its normal fact-finding function but also as to its historic functions of protecting the individual from persecution by the crown. Their lawyers and judges are interested in it.

These nations are starting up the road along which we have traveled for centuries. We must recognize the basic fact of their newness, their lack of traditions, training and experience in free government—if we do that, we can better understand their problems and better help in their solution.

The lawyers, judges, faculty members of their law schools equal those of America in learning, character, and fidelity to the high standards of our profession. There, as here, they furnish leadership in matters of government not only in its normal functioning but in the life and death struggle that they face with the Communist menace both within and without their countries.

We could learn much from the Bench and Bar of these nations. The credit entries are not all on our side of the ledger by any means.

I returned home with an increased measure of pride in our profession caused by my association with its members in those lands.

These nations need our help, but to be remembered is the fact that we also need theirs. I have the thought that they need our aid, financially, if they are quickly to achieve those economic standards that it is to our as well as their advantage that they achieve. But more than that they need our understanding, our patience, our seeing their problems with their eyes.

They are independent nations and rightly determined to remain so. They have the right to walk side by side with us asking that we recognize them as equals—not equals in economic strength, or military might, but equals in right as nations and peoples in the same sense as we deem every person the equal of his fellow before the law.

Once Upon a Time

(Continued from page 30)

are not grateful enough, but I had one grateful client who caused me a year or two of embarrassment. She was a woman who owned a kennel of racing greyhounds, and in gratitude to me she named one of the pups "Mr. Cullinan". That dog became one of the champion greyhounds in the United States. The sports writers used to write articles and run big headlines about him.

I remember one headline, "Mr. Cullinan loves to be petted." That went on for a year or two, but of course every dog has its day, so the day came when I was relieved of the embarrassment with this headline: "Mr. Cullinan put out at stud." This fate, which is not necessarily worse than death, has never befallen an aging lawyer, so far as I am aware.

This is not entirely a legal experience. I was attorney for the *Bulletin* in San Francisco, and one day I was seated in the office of the editor, Fremont Older, when the office boy came in and said, "There are two men outside, Mr. Older. They want to see you." Older was always afraid that by refusing to see callers he might miss a good story, so he said, "Bring them in". In came the two men. One was a great big tall fellow, stupidly drunk. He was being towed by a little fellow who looked like a tugboat pulling an ocean liner into dock.

The little fellow asked our names, and he wrote our names down, and our addresses. Then the little fellow reached into his pocket and pulled out a pair of handcuffs, a revolver and some railroad tickets and some money.

He said, "Now I want to tell you my story. I was the county treasurer of a certain county in Texas (which he named). I was defeated at the last election and I came to California for a holiday. Down in our part of Texas, of course, there are no Republicans, but there are two factions of Democrats, and the faction that is in as a rule indicts the faction that is out, so they indicted me on a charge of embezzlement and they sent this big lug of a sheriff up to arrest me. I haven't committed any embezzlement and I can prove it. I told him I would waive extradition, but he has gone drunk on me. I have taken his wallet away, the handcuffs, revolver and railroad tickets, but now he's trying to give me the slip because I won't let him get any more liquor."

And he went on: "What I am afraid of is this. I can prove positively my innocence of the charge of embezzlement, but if he goes back to Texas without me he will say that I escaped from *him*. That is a felony, and it will be his word against mine, and under usual conditions it is a rare thing for a sheriff to escape from his prisoner. So a court or jury might believe him and then I will be up against it. I wish you gentlemen to be witnesses so that if ever I am called upon to show I didn't escape from the sheriff I shall be able to have you testify to what you see and hear today."

We said we would stand by and he wandered off with his captive captor. I suppose all went well because we never heard from him again.

Readers who stay with this article to this point may deem that the more serious parts are commonplace and the anecdotal parts trivial, and they will be right. But if it be found in any degree amusing it may be, like beauty, its own excuse for being and not out of place in the grave pages of the JOURNAL.

The Impeachment of Andrew Johnson

(Continued from page 18)

Davis in the Wade-Davis Manifesto of August 5, 1864, making a virulent attack on President Lincoln. In the event of the impeachment and conviction of Johnson, the President pro tempore of the Senate would become President of the United States, and Wade had been deliberately selected by a Radical Republican caucus with that prospect in view.

This brings us to another chain of events, the first of which goes back to the assassination of Lincoln.

Public Is Shocked by Hanging of Mrs. Surratt

Lincoln's assassin, John Wilkes Booth, had been killed by the soldiers who apprehended him. Others, thought to be accomplices, including Mrs. Mary Surratt, the keeper of a boardinghouse in Washington, had been tried before a military commission, convicted and hanged. The entire proceedings of this commission had never been made public, but there had been persistent rumors that President Johnson had ignored a recommendation of mercy in the case of Mrs. Surratt. The hanging of a woman, on slender circumstantial evidence, shocked many people. The rumors became even more damaging when it was revealed that the War Department had suppressed Booth's diary, although it was openly stated in the House by Representative Ben Butler that its production would have cleared Mrs. Surratt of complicity in the murder.

In June, 1867, her son John H. Surratt, who had fled to Europe, was tried before a jury in Washington for the murder of Lincoln and was acquitted. In the course of this trial question was raised as to whether there had been a recommendation of mercy for Mrs. Surratt, and the

War Department was forced to produce the record in her case. From this it developed that such a recommendation had been made but that it had been written on a separate sheet of paper and had been withheld when the record was presented to Johnson and considered by his Cabinet. He had signed the death warrant in ignorance of it.

The conclusion seemed inescapable that the Secretary of War had been a party to the deception and on June 5, 1867, the day that Johnson re-examined the record in Mrs. Surratt's case, he sent the following letter to Stanton:

> Sir: Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted.
>
> Andrew Johnson
> President of the United States

Stanton replied the same day as follows:

> Sir: . . . In reply, I have the honor to say that public considerations of a high character, which alone have induced me to continue at the head of this department, constrain me not to resign the office of Secretary of War before the next meeting of Congress.
>
> Edwin M. Stanton
> Secretary of War

On August 12, 1867, President Johnson issued an order suspending Stanton from office and authorized General Grant to act as Secretary of War ad interim. Congress was not in session but when it reconvened Johnson officially notified the Senate of his suspension of the Secretary of War. On January 13, 1868, the Senate disapproved the suspension thirty-five to six, twelve Senators not voting. It had been Johnson's plan, in such an event, to deny Stanton access to the War Department and thereby force him to take the matter to court, where the constitutionality of the Tenure of Office Act could be tested. However, General Grant, when advised of the Senate's action, surrendered the office and permitted Stanton to regain possession. Following these events Thaddeus Stevens and George S. Boutwell sponsored a second attempt to impeach Johnson, but it was voted down six to three in the House Reconstruction Committee, on motion of John A. Bingham.

The President was now determined to force the issue and on February 21, 1868, he issued orders removing Stanton from office and appointing Adjutant General Alonzo Thomas Secretary of War ad interim. Stanton refused to surrender possession of the office. Events now tumbled over each other. Upon receipt of a message from Stanton telling of his removal, Representative John Covode, of Pennsylvania, moved the impeachment of the President. On the same day the Senate, by a vote of twenty-eight to six, adopted a resolution declaring Stanton's removal unlawful. Analysis of this vote indicated that more than two thirds of the Senate could be counted against Johnson on the issues involved in the Tenure of Office Act and the leaders of the House so construed it. Passage of the resolution to impeach was delayed only by the irrepressible desire of Radical Representatives to make speeches in support of it, and on February 24 it carried, 126 to 47, on a straight party vote. Thereafter seven managers were elected: John A. Bingham, of Ohio, George S. Boutwell and Benjamin Franklin Butler, of Massachusetts, John A. Logan, of Illinois, Thaddeus Stevens and Thomas Williams, of Pennsylvania, and James F. Wilson, of Iowa.

On March 4, 1868, eleven articles of impeachment were formally presented to the Senate, the substance of which was as follows:

Article 1 alleged that on February 21, 1868, President Johnson unlawfully issued an order for the removal of Stanton as Secretary of War, with intent to violate the Tenure of Office Act of March 2, 1867.

Articles 2 and 3 made similar accusations based on the appointment of Adjutant General Thomas as Secretary of War ad interim.

Articles 4, 5, 6 and 7 alleged, with variations, a conspiracy between Johnson, Thomas and others to oust Stanton. One of these (Article 6) contained an allegation of conspiracy to seize the War Department by force.

Article 8 alleged that the appointment of Thomas was with intent to unlawfully control moneys appropriated for the military service.

Article 9 alleged that on February 22, 1868, Johnson had instructed General Emory that the Appropriation Act rider requiring all military orders to be issued through the General of the Army was unconstitutional.

Article 10 alleged that during the congressional elections of 1866, Johnson had made certain speeches which "did attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States".

Article 11 was a deliberately obscure restatement of the principal charges referred to in the first nine articles. It was designed by Thaddeus Stevens to furnish a common ground for those who favored conviction but were unwilling to identify themselves with the specific issues covered by the other articles.

Impeachment Trial of the President Begins

Article I., Section 3 of the Constitution, dealing with the trial of impeachments by the Senate, provides tnat

> When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two-thirds of the Members present.

At the time of the trial of Andrew Johnson there were 54 senators, of whom eight were Democrats and four were pro-Johnson Republicans. The remaining 42 were anti-Administration Republicans. Conviction would require only 36 votes.

On March 5 the Chief Justice, Salmon P. Chase, of Ohio, met with the Senate and announced that he was ready to take an oath for the purpose of forming a "Court of Impeachment". The Senate had already decided that the Chief Justice was merely a presiding officer and not required to be sworn, but this the Chief Justice brushed aside. Then, having been sworn by Justice Nelson, who had accompanied him for that purpose, the Chief Justice had the roll called and administered the oath to every Senator, requiring him to do "impartial justice according to the Constitution and laws".

Whether the Senate was acting as a court or as a legislative body was an important question. If the trial was to be decided on a political basis, there were ample votes to convict. Johnson could be acquitted only if a substantial number of Senators acted independently of party organization.

The House Managers contended that the entire impeachment process, including the trial, was a legislative proceeding in the nature of an inquest of office and that it was not necessary to prove the commission of any crime. On their theory the Chief Justice was merely a presiding officer and the Senate could receive or reject evidence without regard to the custom in courts of law. In keeping with this view the House Managers invariably addressed the Chief Justice as "Mr. President", whereas Johnson's counsel with equal consistency addressed him as "Mr. Chief Justice".

From his first participation in the trial and at all critical points, Chief Justice Chase maintained that he and the Senate constituted a court, that he was entitled to pass upon questions of evidence, subject to appeal to the court as a whole, and that he was entitled to cast a vote in the event of a tie. He was not long in being challenged. On examination of the first witness, House Managers Butler and Bingham argued against the right of the Chief Justice to rule on the admissibility of evidence. A motion to retire resulted in a tie and he cast the deciding vote in its favor. The Senate sustained the Chief Justice's right to decide questions of evidence in the first instance, whereupon Senator Sumner moved to declare the Chief Justice's casting vote "without authority under the Constitution". This was defeated 27 to 21.

While the Senate was being sworn, Senator Thomas F. Hendricks, of Indiana, a Democrat, protested that Senator Wade, as next in line of succession to succeed to the Presidency, was not in a position to do impartial justice and should not be a member of the court. After debate, Hendricks withdrew his objection and Wade was sworn. Thereafter Senator Sumner sought to prevent the seating of George Vickers, newly elected Senator from Maryland, on the ground that Maryland did not have a republican form of government. This move also failed.

The court having been organized, the arraignment of the President was set for March 13. To the Washington public it was a gala event. Passes were at a premium and the galleries were thronged. At the appointed hour and in a stentorian voice, the Sergeant at Arms called the President's name. All eyes turned to the door to catch the first view of the central figure of the drama. Nothing happened. The silence was tense. The Sergeant at Arms called again. Then, suddenly, the door opened and in bustled the fat figure of Representative Ben Butler, one of the House Managers. The tension broke in a roar of laughter, leaving Butler nonplused in the aisle.

President Johnson never did appear at the trial in person. He was, however, represented by an outstand- group of lawyers: Henry Stanbery, of Ohio, Benjamin R. Curtis, of Massachusetts, Thomas A. R. Nelson, of Tennessee, William M. Evarts, of New York, and William S. Groesbeck, of Ohio. All were leaders in their profession. Stanberry had been appointed Attorney General by Johnson after a long and honorable career at the Bar. Curtis had been a member of the Supreme Court and had been one of the two dissenting judges in the *Dred Scott*

case, after which he had returned to private practice.

At the time of the arraignment, Jeremiah S. Black had also been one of the President's counsel but withdrew under circumstances which were later bandied about in the arguments. Black was one of the most eminent lawyers of his day. He had resigned from the Supreme Court of Pennsylvania to become Attorney General and later Secretary of State in the Cabinet of President Buchanan and had been a trusted adviser of President Johnson, having drafted the veto message to the Reconstruction Act of March 2, 1867. Among Black's clients was a corporation claiming ownership of the guano deposits on the island of Alta Vela which had been seized by the Government of Santo Domingo. Black had urged that a United States warship be dispatched to the scene but Seward, as Secretary of State, opposed intervention by the Government. Another attorney got Representative Benjamin F. Butler to write a letter upholding the corporation's position and advocating intervention by the executive "in the most forcible manner consistent with the dignity and honor of the Nation". Written endorsements were secured from three of the other managers in the impeachment proceedings and the letter was then delivered to President Johnson. Although he had originally favored intervention, his reaction to such pressure was an indignant refusal and in the ensuing unpleasantness Black withdrew as one of his counsel. He was replaced by William S. Groesbeck.

In the course of argument at the trial, Representative Boutwell alluded to Black's withdrawal as an indication of his belief in the President's guilt, whereupon Thomas A. R. Nelson stated the facts. Butler insisted that the letter had been written before the impeachment and Logan stated that he had signed it "long before there was anything thought of impeachment". Nelson produced the letter. It was dated March 9, 1868, two weeks after Johnson had been impeached by the House and six days after Butler, Logan and the others had been elected Managers.

Another sidelight of importance involved the case of Colonel William H. McCardle, formerly of the Confederate Army and now a newspaper editor at Vicksburg, who had published editorials criticizing the official conduct of General E. O. C. Ord, commander of the Fourth Military District. General Ord had him imprisoned and held for trial by a military commission and McCardle sought release on a writ of habeas corpus. On the basis of the provisions of the Reconstruction Act giving military commanders authority to imprison and try civilians, the Circuit Court decided against McCardle and he appealed directly to the United States Supreme Court which, in the recent case of *Ex parte Milligan*, 4 Wall. 2, had held contrary to the War Department's position. The Supreme Court denied a motion to dismiss the appeal, 6 Wall. 318, and took the case under advisement after hearing argument on the merits on March 2, 3, 4 and 9, 1868. 7 Wall. 506. The case put in issue the constitutionality of the Reconstruction Act and it was obvious that a decision of the Supreme Court in McCardle's favor would materially strengthen Johnson's position. Congress rushed through a bill to withdraw the Supreme Court's jurisdiction in the case. This was vetoed by Johnson on March 25, 1868, but was passed over his veto on March 27. The impeachment trial started on March 30.

Did Stanton's Removal Violate the Tenure of Office Act?

In the course of the trial, it soon became apparent that the only charge of substance was that Stanton's removal constituted a wilful violation of the Tenure of Office Act which, by its terms, protected cabinet officers *only*

> for and during the term of the President by whom they may have been appointed, and for one month thereafter.

Stanton had been appointed by Lincoln during his first term.

Butler and the other House Managers contended that Johnson did not have a term of his own but was merely serving out Lincoln's term, and that Lincoln's term embraced both of the four-year periods for which he had been elected and re-elected. The defense, on the other hand, argued that Lincoln had been elected for two separate terms and, under the language of the Act, could have removed Stanton one month after the commencement of his second term. Furthermore, they argued that the constitutional term of a President was subject to the limitation of death, as well as a time limitation. Accordingly, Lincoln's second term ended with his assassination, at which time a new term began for Johnson.

The most complete exposition of the issues involved in the Tenure of Office Act was by Curtis, who opened for the defense. He argued:

First, that the express language of the Tenure of Office Act did not cover Stanton, but, on the contrary, that it excluded him.

Second, that at the time of the Senate's passage of the Act, Senator Sherman and others had explicitly stated that it did not apply to Stanton. "How is it possible" asked

Curtis, "for this body to convict the President of the United States of a high misdemeanor for construing a law as those who made it construed it at the time when it was made?"

Third, the first article charged the President not merely with a violation of the Act in removing Stanton but with an *intentional* violation. Even if it be assumed that minds may differ as to the proper meaning of the words used, was it an intentional violation, punishable as a crime, to seek a judicial determination of the issue, especially when such was done on the advice of his Cabinet and of his duly constituted legal adviser?

The House Managers were well aware of the force of this last point, as well as of the others, and, when Secretary of the Navy Gideon Welles was called to the stand, it became clear that neither he nor any other cabinet officer would be permitted to testify. While he was on the stand, the defense made the following offers of proof:

(1) That the members of the Cabinet advised the President that the Tenure of Office Act was unconstitutional and that Seward and Stanton were to prepare a draft of a veto message to that effect. On objection, Chief Justice Chase held the evidence admissible on the question of intent. Senator Howard called for a vote and the Chief Justice was overruled, 29 to 20.

(2) That when the Tenure of Office Act was under consideration, Stanton being present, the Cabinet expressed the opinion to the President that it did not apply to the Secretary of War and the others appointed by Lincoln. The Chief Justice held the evidence admissible but was overruled, 26 to 22.

(3) That the Cabinet later advised that a judicial determination of the constitutionality of the Act should be obtained, but that no suggestion of the use of force was ever made. Same result.

Senate Admits Testimony of General Sherman

On another occasion, General Sherman had been called to the stand to testify with regard to the President's proposal to appoint him Secretary of War ad interim. The Senate, overruling the Chief Justice by a vote of 28 to 23, would not permit him to answer defense questions as to his conversations with the President. The matter was debated at length and with great heat. Finally, Senator Reverdy Johnson, of Maryland, a Democrat, submitted a written question: "When the President tendered to you the office of Secretary of War ad interim, on the 25th and 30th of January, did he, at the very time of making each tender, state to you what his purpose in doing so was?" The Senate voted 26 to 22 to admit the question and General Sherman testified that the President had said it was his purpose to secure a court test of the act. Presumably, the admission of this evidence was attributable to the great respect in which both General Sherman and Senator Reverdy Johnson were held, as well as to the fact that General Sherman was the elder brother of Senator Sherman.

The other articles of impeachment shrank in importance as the trial wore on. The testimony as to what the President had said and done on his tour during the congressional elections of 1866 was so mild compared with what everyone had read in the Republican press that it seemed startling in its innocence. Especially marked was the absence of any evidence of drunkenness or misconduct. Furthermore, what the President had said about Congress was tea-talk compared to what everyone knew had been said about him in Congress. In the debate on the Tenure of Office Act, Senator Sumner had called him "an enemy to his country" and "an usurper". On another occasion, Thaddeus Stevens had read into the record of the House a statement referring to Johnson as "an insolent drunken brute, in comparison with whom even Caligula's horse was respectable".

It will be recalled that the sixth article had charged a conspiracy between President Johnson and Adjutant General Thomas to seize the War Department "by force". On the issue of force, the evidence adduced from Adjutant General Thomas was revealing.

On the night of February 21, Stanton had secured a warrant for Thomas' arrest and he had been taken into custody at eight o'clock on the morning of the twenty-second, just as he was about to sit down to breakfast. After some hours he was released on bail and walked over to the War Department to "take over". He found Stanton flanked by six or eight members of Congress and testified to the following interchange:

> I came in the door. I stated that I came in to demand the office. He refused to give it to me, and ordered me to my room as Adjutant General. I refused to obey. I made the demand a second and a third time. He as often refused, and as often ordered me to my room. He then said, "You may stand there; stand as long as you please."

Thomas further testified that

later, after the Congressmen had left,

> I said, "The next time you have me arrested, please do not do it before I get something to eat." I said I had nothing to eat or drink that day. He put his arm around my neck, as he sometimes does, and ran his hand through my hair, and turned to Gen. Schriver and said, "Schriver, you have got a bottle here; bring it out."
>
> *Question, by Mr. Stanbery:* What then took place?
>
> *Answer*: Schriver unlocked his case and brought out a small vial, containing I suppose about a spoonful of whiskey, and stated at the same time that he occasionally took a little for dyspepsia. Mr. Stanton took that and poured it into a tumbler and divided it equally and we drank it together.
>
> *Q.* A fair division?
>
> *A.* A fair division, because he held up the glasses to the light and saw that they each had about the same, and we each drank. Presently a messenger came in with a bottle of whiskey, a full bottle; the cork was drawn, and he and I took a drink together. "Now," said he, "this at least is neutral ground."
>
> *Q.* Was that all the force exhibited that day?
>
> *A.* That was all.

Closing Arguments Took Thirteen Days

The introduction of evidence took only four court days, excluding time out for disputes, but the closing arguments of counsel occupied thirteen, of which the prosecution took six and the defense seven. Butler and Curtis having opened, the closing arguments were left to the other attorneys. Eight argued, equally divided between prosecution and defense, in the following order: Boutwell, Nelson, Groesbeck, Stevens, Williams, Evarts, Stanbery and Bingham. The galleries overflowed to hear Bingham, who was generally accounted the most able lawyer and orator among the House Managers, but by this time virtually everything possible had been said. The substance of his presentation was threadbare but the galleries went so wild with enthusiasm that they had to be cleared.

Bingham concluded on Monday, May 4, 1868, and the following Monday, May 11, was set for deliberation. Under the rules each Senator was to be permitted to speak once, for fifteen minutes, on the day of deliberation. The vote was to be taken on the following day, Tuesday the twelfth, and senators who wished to do so could file written opinions within two days thereafter.

The intervening week was one of feverish activity. Tallies had been kept showing the position of each individual Senator on all votes taken during the trial and it was obvious that the result would be close. All eight Democrats and the four pro-Johnson Republicans were assumed to be for acquittal, but at least eight anti-Administration Republicans were known to be doubtful or worse. Thirty-six were needed to convict and this would require votes of "Guilty" by at least two of the eight.

A careful check was kept by the House Managers and their allies of the movements of all wavering Senators and they were cajoled or coerced as opportunity offered. Watchers were assigned to keep a record of all guests of the Chief Justice, who frequently entertained friends and associates at dinner. When it was reported that Senator John B. Henderson, of Missouri, one of the doubtfuls, had gone there for dinner in company with Senator Reverdy Johnson, Ben Butler exclaimed, "We have been sold out!"

When the Senate met on Monday, May 11, each Senator was given fifteen minutes to express his views. Although they met in private, it soon became generally known that Senator Sherman had declared that he could not vote "Guilty" on Article 1 and that enough other Senators had expressed the same view to prevent conviction on that charge. Also, that the opinions foreshadowed a like result on Articles 4 through 10. This left only three Articles, 2, 3 and 11, on which it seemed possible to produce a conviction, 11 being the most likely.

The deliberations had shown not only the relative strengths and weaknesses of the articles of impeachment; they had also shown the views of the individual Senators. Among the Republicans, Dixon, of Connecticut, Doolittle of Wisconsin, Norton, of Minnesota, and Patterson, of Tennessee, had been regularly pro-Johnson and were expected to vote "Not guilty". In addition, Fessenden, of Maine, Grimes, of Iowa, Trumbull, of Illinois, and Van Winkle, of West Virginia, had also come out for acquittal. What was almost worse from the Radical standpoint, four more were uncommitted. Whatever the result, it would be close and time was needed to bring the wavering Senators into line. Accordingly, at a secret caucus of the Republican majority, it was deter-

mined to defer the final vote and on the next day, May 12, Senator Howard's illness was used as justification for a postponement until Saturday the sixteenth.

During the four-day interim, the heaviest sort of pressure was brought to bear on the doubtful senators, Fowler, of Tennessee, Henderson, of Missouri, Ross, of Kansas, and Willey, of West Virginia.

Republican Congressmen, including Senators as well as Representatives, organized the Union Congressional Committee which sent the following telegram to every state having a Senator who had not definitely committed himself:

> Great danger to the peace of the country and the Republican cause if impeachment fails. Send to your senators public opinion by resolutions, letters and delegations.
> Robert C. Schenck, Chairman

Constant badgering by fellow members of the Missouri delegation and others so wore down Senator John B. Henderson that he offered to resign to make way for someone more pliant. On reflection, however, he realized that such a solution would not satisfy either his conscience or his constituents.

Senator Waitman T. Willey, of West Virginia, was a leader of the Methodist Church which was then holding its General Convention in Chicago. Bishop Simpson moved that the Convention devote an hour of prayer in aid of impeachment. To satisfy the demands of decorum, this was amended so as to set aside an hour of prayer "to beseech God to save our senators from error". The African M. E. Church, which was meeting in conference in Washington, also adopted a prayer for conviction, this one being addressed directly to the Senate rather than to God.

Some indication of the type of coercion applied to Senator Edmund G. Ross, of Kansas, is given by the following exchange of telegrams:

> *Hon. E. G. Ross:* Kansas has heard the evidence and demands the conviction of the President.
> D. R. Anthony, and 1000 others.
>
> • • •
>
> *To D. R. Anthony and 1000 others:* I have taken an oath to do impartial justice . . . and I trust I shall have the courage and honesty to vote according to the dictates of my judgment and for the highest good of my country.
> E. G. Ross
>
> • • •
>
> *Hon. E. G. Ross:* Your telegram received . . . Kansas repudiates you as she does all perjurers and skunks.
> D. R. Anthony and Others

In that period, most of the congressmen in Washington were quartered in rooming houses and their opportunities for privacy were limited. Ross was given so little peace that he had to move to the house of a friend to get any sleep. On the last night before the vote, General Sickles, who had been detailed by Stanton to use his influence, waited until 4 A.M. in Ross' quarters, hoping to intercept him. Ten minutes before voting time, Senator Pomeroy, also of Kansas, warned Ross in the presence of Thaddeus Stevens that a vote for acquittal would result in a charge of bribery and in his political death.

At noon on Saturday, May 16, the court met to vote. Senator Williams, of Oregon, promptly moved to change the order of voting so as to bring up the eleventh article first and the motion was adopted 34 to 19, Senator Grimes being absent. Grimes, seriously ill, was then carried in, the eleventh article was read, and the voting started.

Senator Ross Refuses To Yield to Pressure

Everyone was aware that the outcome depended upon the four doubtful Senators. If three of them voted "Not guilty", the President would be acquitted. Fowler, the first one reached, answered so indistinctly that he was thought to have said "Guilty". The Chief Justice requested him to repeat his answer and he fairly shouted "Not Guilty". Henderson, in his turn, voted "Not Guilty". Everything now hinged on Ross, considered the most doubtful of them all. The suspense became unendurable as the Chief Justice put the lengthy question, "Mr. Senator Ross, how say you? Is the respondent Andrew Johnson, guilty or not guilty of a high misdemeanor as charged in this article?" Ross stood up and in a clear voice answered "Not Guilty".

The rest of the roll call was an anticlimax. It was expected that Van Winkle, of West Virginia, would vote "Not Guilty", and he did; but his colleague, Willey, voted "Guilty", thus bearing testimony to the efficacy of prayer. Notwithstanding Willey's return to regularity, the President was acquitted by one vote, the tally standing at 35 to 19. Wade, the prospective beneficiary of the impeachment, voted "Guilty", although he could have abstained without altering the result.

The Chief Justice then directed that the first article be read. Sherman and others who had voted "Guilty" on the eleventh were committed against conviction on the first and an immediate move was made to adjourn. Voting on the other articles was put off for ten days, until May 26.

During the interval the House leaders followed the dictates of desperation. They rushed through bills to admit six Southern states which by now had been brought under

carpetbagger rule and whose Senators-elect were already in Washington, ready and willing to vote for conviction. But this was too gross for the Senate majority and the bills were not passed in time to affect the impeachment.

In addition, the House constituted the Impeachment Managers a committee of investigation and the local banks were ordered to produce transcripts of the bank accounts of each of the Republican Senators who had voted for acquittal. A sporting gentleman, named Charles Woolley, who had been betting on acquittal, was interrogated at length and, upon his finally balking at further questioning, was imprisoned in the Capitol cellar. Senator Henderson was directed to appear before the committee for examination, but indignantly refused and submitted the matter to the Senate as a palpable breach of propriety. Senator Sumner saw nothing wrong in the Committee's action and intimated that a Senator who had nothing to hide should have no objection to being examined.

Recourse was also had to the professional witnesses with which Washington seems to have abounded. Senator Pomeroy, of Kansas, referred the commitee to an individual named Legate who testified that Senator Ross had indicated a willingness to change his vote for a consideration. Unfortunately for the House leaders, Legate, taking professional pride in the production of corroborative detail also swore explicitly that Senator Pomeroy had made an offer to produce three votes for acquittal for $40,000.

Other forms of pressure were also applied and by the twenty-sixth it was rumored that Ross had been won over. It was with the greatest excitement, therefore, that the Senate assembled for a vote on the remaining articles.

At the outset the majority again changed the order of voting, so as to skip the first article and take up the second and third. The calling of the roll proceeded on its ponderous way, each of the Senators voting on the second article just as he had on the eleventh, down to Ross. By the time he was reached the tension was terrific. His name was called. He stood up and, in a calm, almost casual voice, said "Not guilty".

For all practical purposes the proceedings were ended. A vote was taken on the third article with identical results, 35 to 19, and then a motion was carried to adjourn sine die. The impeachment was over, having failed by a single vote on each of the three articles submitted. The first article, which was the key to the entire proceeding, was never put to a test.

When Johnson retired from the Presidency the following March, everyone, including his friends, believed him politically dead. Everyone, that is, except Johnson. With grim determination, he set himself to fight his way back to the Senate. His first tries were unsuccessful. To both Democrats and Republicans he was an apostate. But finally he surmounted all obstacles and in January, 1875, the Tennessee legislature re-elected him to the Senate. He served one session and was a member when he died on July 31, 1875.

The Republicans who had voted for his acquittal met a harsher fate. In the eyes of the party organization their votes had sealed their doom. Not a single one was re-elected. Those who did not die first were promptly retired from public life upon the expiration of their terms of office. Only Henderson ever achieved any public token of party forgiveness. He was made chairman of the Republican National Convention in Chicago, but this was not until 1884.

Special severity was reserved for Edmund G. Ross, of Kansas. After his acquittal vote, one of the justices of the Supreme Court of Kansas telegraphed him, "The rope with which Judas Iscariot hanged himself is lost, but Jim Lane's pistol is at your service." On the expiration of his term in the Senate he returned to Coffeyville, Kansas, where he opened a printing shop. Shortly thereafter D. R. Anthony, the author of the "perjurers and skunks" telegram, forced his way into the shop and gave Ross such a beating that he never fully recovered his health. For some time he lived in poverty, supported by his friends, but later moved to New Mexico as a journeyman printer and in 1885 was appointed Governor of that Territory by President Grover Cleveland, a Democrat.

Although the Republican Senators who voted for acquittal must have reflected with dismay on the reward of respecting their oaths, it could not dim the importance of their acts. Few people today would question the force of Senator Lyman Trumbull's opinion in the impeachment proceedings, where he said:

> Once set the example of impeaching the President for what, when the excitement of the hour shall have subsided will be recognized as insufficient causes . . . and no future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate on any measure deemed by them important, particularly if of a political character. Blinded by partisan zeal, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their purposes, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity? They are all gone.

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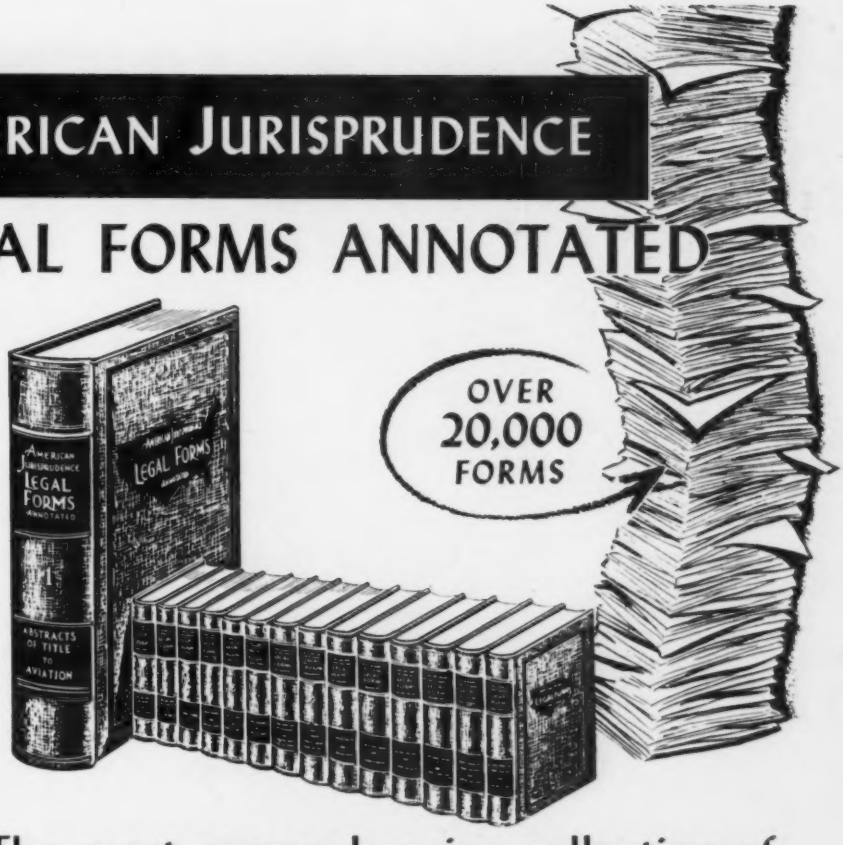

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